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PLEADING CUSTOM IN AN ACTION FOR NEGLIGENCE OF WORKMEN CONSTRUCTING TELEPHONE LINE—A CRITICISM.

In the case of Brunke v. Missouri & K. Tel. Co., 90 S. W. Rep. 753, the opinion states the facts as follows: Plaintiff recovered judgment in the sum of $1,500 on account of personal injuries sustained as the result of the negligence of defendant. The pertinent facts shown by the evidence are as follows: In the afternoon of April 29, 1904, plaintiff, a boy then about 11 years of age, residing with his parents in the city of St. Joseph, while on his way home from school, had his attention attracted by some repairs which linemen employed by defendant were engaged in making near the intersection of Twenty-Sixth and Olive streets, upon telephone wires strung over-head and carried on poles. The placewas in a populous part of the city, and the telephone line was in the street. Plaintiff asked and obtained permission from one of the workmen to take a piece of wire lying near the base of the pole that was the center of activity at that time. As he started to pick it up the workman attempted to throw a cleaver, a heavy edged tool, to a lineman who was near the top of the pole making the repairs. The lineman failed to catch the implement, and it fell, striking plaintiff upon the head and inflicting severe injuries.

Defendant, appellant here, assigns but one error. Plaintiff, over defendant's objections, was permitted to show by the testimony of linemen, who were examined as witnesses, that the usual method employed by such craftsmen in passing a tool from the ground to the top of a pole was by attaching it to a line and having it pulled up by the man at the top. Defendant says that, as no such usage was pleaded in the petition, it was harmful error to admit the evidence. The negligence charged in the petition is: "The servants at work on the ground threw or pitched a cleaver towards the man engaged at work on the top of said telephone pole and that the servant engaged at work on the top of said pole failed to catch said cleaver. * * * Th servants and agents of defendant knew that there were large numbers of children passing along and on said Twenty-Sixth and Olive streets at the time said cleaver was thrown, and knew, or by the exercise of ordinary care would have known, that said cleaver was liable to injure a pedestrian on said street." The negligence averred is involved in the act of throwing into the air upon a frequented thoroughfare in a city a dangerous instrument, which, if not caught, menaced the safety of a person rightfully upon the street.

We have no fault to find with the conclusion of the court that the act complained of was negligence; in fact, it seems to us a clear case for punitive damages, had the plaintiff chosen to have sued therefor. But it was certainly rank error to allow evidence to be introduced of a particular custom, without an instruction such as is hereinafter shown to have been required, by the very authority quoted to sustain the position of the court with regard to the objection made by defendant's attorney to the admission of evidence of a particular custom without having pleaded it. The matter is very carefully gone into by Professor Wigmore, in his work on Evidence, which the court quotes to support its position. That a court should have written such an opinion, after having read the section cited by it, seems almost incredible. The conclusion reached was just what might be expected of a court which had not found out that it is the law that a custom must be pleaded, and that it was so held in the state of Missouri in the St. Louis Court of Appeals, by one of the ablest judges that the state has ever had. In the case of Hayden v. Grillo, 42 Mo. App. 1, Judge Seymour D. Thompson, said: "The other instruction tendered by the defendant, and refused, proceeds upon the hypothesis of a custom, existing among real-estate agents of St. Louis, to give their principals notice of having procured a purchaser, after the lapse of considerable time between the employment and the procuring of a purchaser. The court properly refused this instruction, for the reason that there was no such issue in the case. The only answer, on which the case went to trial, was a general denial. It is necessary to plead a special custom, where such custom is relied upon."

The jury not being informed, in the principal case, that the custom prevailing relative to the manner of handling tools, must only be taken as evidence of a proper method and not conclusive upon the defendant, because it did not employ such method. The jury might well have taken this fact, as shown, as conclusive upon the defendant, and while it might not in the principal case have worked an injustice, as a general rule the new conclusion reached, by the Kansas City Court of Appeals, if followed, will frequently work a great injustice. Judge Thompson seemed to regard this rule as so definitely settled that he did not even cite an authority for it. It might further be said, that, if such a rule had occurred to him as being an oppressive one, we would have had recorded an interesting protest; but, had the Kansas City court turned to page 46, sec. 16, of the 5th edition of Gould on Pleading, by Prof. Head, it would have found the following: "In pleading particular customs or private statutes, not only must the facts which bring the case within the custom or statute be pleaded, but the custom or statute itself, or at least so much of it as is material to the case must be recited by the party complaining or defending under it; the recital in these cases is not to be deemed matter of law. For such customs and statutes, although they may respectively furnish the rule of decision in cases falling within them—are no part of the law of the land; but like private records, prescriptions, deeds, etc., are regarded and treated in pleading as matters of fact, of which the courts of justice cannot take judicial notice. Hence it is, that the existence of any such custom or statute may be denied by plea; and that when so denied, it must be proved as a fact and can only be tried on an issue of fact. Whereas matter of law, properly so called, can never be denied in pleading."

With this knowledge within the court it could not have failed to understand Prof. Wigmore's very fine and comprehensive statement of the law to which the Kansas City court refers in the principal case. Wigmore on Evidence, Sec. 461. In the course of his discussion, Prof. Wigmore says: "The chief difficulty here is of another sort. It arises from the necessity of distinguishing between the use of such facts evidentially and their use as involving a standard of conduct in substantive law. The distinction is in itself a simple one. 1. The conduct of others evidences the tendency of the thing in question; and such conduct, *e. g.*, in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or not using them, is receivable with other evidence showing the tendency of a thing as dangerous, defective, or the reverse. But this is only evidence. The jury may, from other evidence find that the thing was, in fact, dangerous, defective, or the reverse, and that its maintenance was or was not negligence, in spite of the above evidence. 2. Meanwhile the substantive law tells them what the standard of conduct for negligence is, and that this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it shows what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law. This distinction is patent enough, but is sometimes judicially ignored. Such evidence is sometimes excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it with an express caution that it is merely evidential and is not to serve as a legal standard."

This section is evidence of a masterful grasp of the law on the part of Professor Wigmore, and in order to fully appreciate it, the whole section should be read. He leads up to his conclusions with the use of such illustrations as prepare the reader for a full understanding of the subject matter. This very important distinction is left out of the Kansas City court's opinion and the latter's conclusion is as follows: "What has been said also disposes of the second question. As custom is not substantive, but evidential in character, it is not required that it should be pleaded. The rules of pleading call for the statement of constitutive facts, and not of evidence by which those facts are to be established." This is case-law, the like of which is fast growing in many parts of the country

and being cited as precedent for other cases. The CENTRAL LAW JOURNAL has been calling attention to these cases (and there are many of them in many states), and the importance of having more judges in our courts, so that more time may be given to the consideration of each case. It shows also the importance of having men on our appellate benches who are careful thinkers and hard workers.

There is not only evidence in this opinion that the court did not make an examination of the previous decisions, but of great carelessness in the examination of the very authority given to sustain its erroneous conclusion, that a custom is not required to be pleaded in order to be introduced as evidence for any purpose, let alone the clear conditions upon which the evidence of a particular custom may be evidenced, as shown above. It is infinitely better to go slow and be sure, than fast and knock down the landmarks which have been builded out of the materials gathered from the accumulated wisdom of the ages.

NOTES OF IMPORTANT DECISIONS.

DEATH—WHAT EVIDENCE IS SUFFICIENT TO GIVE RISE TO PRESUMPTION OF DEATH FROM UNEXPLAINED ABSENCE.—Although seven years' absence of a party from his usual place of abode gives rise to a presumption that he is dead, it is not sufficient for the interested party to show first that the party whose death is sought to be presumed has been absent from his usual place of abode, and that he has not heard from him during all that time. He must further show, and, indeed, it is the most important fact to show, that inquiry has been made at his place of business, of his social acquaintances, or at any of the usual haunts of the person supposed to be dead, and that no one at any of these places has ever heard from him for the time required. For it is evident that a wife suing for her husband's life insurance, would be an interested party, and her testimony that she had not heard from her husband for seven years would not be as strong as the testimony of his business employers, or his social chums, and if the wife in such a case should not offer the evidence of such parties a court can refuse to sustain a verdict of a jury of the death of her husband based on a presumption which is attempted to be drawn from her uncorroborated testimony; for, it is evident, that if inquiry had been made of all the social clubs to which the supposed deceased belonged, or to his employers, and anyone of them had heard from him within the seven years period, the presumption of death would not arise. It is therefore necessary for the plaintiff, attempting to prove the death of a certain person on the presumption that arises from his unexplained absence, to exhaust every avenue of inquiry and show positively that no one likely to have heard from the party supposed to be dead has heard from him within the required time.

A recent case from the Supreme Court of Kansas refuses to modify the strictness with which the rule stated in the preceding paragraph is usually and should always be applied, even in a case where a father and mother testify to the unexplained absence of a son and seek to collect the insurance on his life by reason of his presumed death. This is the case of Modern Woodmen of America v. Gerdom, 82 Pac. Rep. 1100, where the court held that in order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death, arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry. The court proceeded to explain the extent of the inquiry by saying that the inquiry should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to receive tidings if the party were alive, whether members of his family or not; and, in general, the inquiry should exhaust all patent sources of information, and all others which the circumstances of the case suggest. The Supreme Court of Kansas in the course of a very valuable and interesting opinion says: "It is true that death may be proved by circumstantial evidence, and that absence for a considerable period of time is not indispensable in order to generate a satisfying conviction of the fact. 13 Cyc. tit. 'Death.' But in all such instances the death of the absent party must fairly be demonstrated by the circumstances of the disappearance. If, for example, in connection with other facts showing a want of motive for absence, it should appear that the missing person was on a vessel which foundered, or a train which was wrecked, or engaged in some hazardous enterprise, or met with an accident which might be expected to result fatally, or was exposed to perils incompatible with his age or the state of his health, or was afflicted with a fatal disease, or was mentally infirm, or was suicidally inclined, belief in the fact of death might be forced upon the mind very soon after the disappearance. And in some cases the age, health, disposition, moral character, domestic relations, social rank, and financial condition of one who suddenly disappears may themselves, without the aid of other circumstances, stifle all doubt that the person is dead. Such, at least, is the view of most of the courts of last resort, although the Supreme Court of Louisiana, in a case of absence apparently quite inexplicable except upon the assumption of

death, very prudently observes: 'Disappearances such as his are not, unfortunately, of rare occurrence. Like instances are numerous. Men apparently as happy in their domestic relations as he was, who in social position, in wealth, in the success of gratified ambition, were his equals, have been known to leave everything which is commonly looked upon as making life dear, to wander off among strangers and perils, and bury themselves for years, without leaving a trace behind them, in places and among people who were strange, and, it would be thought, repulsive to their tastes and their habits, and repugnant to those principles of honor and virtue which are the foundations of an honest domestic society.' Succession of Vogel, 16 La. Ann. 139, 79 Am. Dec. 571. But in all the cases enumerated lapse of time is in a measure a subsidiary matter. There must be a sufficient opportunity for investigation and search, and after the expiration of a period ample for those purposes further stretches of duration without tidings may confirm the inference of death. But the strength of the induction of death lies in the cogency of the circumstances of the disappearance and not in the fact of absence long protracted. No doubt considerations of this character impelled the attorneys for the plaintiffs to allege that the death of the assured occurred at the end of a period of seven years' unexplained absence, and hence at a time and place and under circumstances unknown to the plaintiffs and undiscoverable by them; and doubtless for the same reason no attempt was made to prove death as a fact. There is no suggestion in the evidence of any casualty occurring, or of any peril encountered, or of any paradox in the disappearance. On the other hand, when last heard of, the missing party was a young, unmarried man, in good health, with the wander-lure upon him, trying his fortune in a distant state, able to make his own way in the world, but whose circumstances had become such, or whose disposition toward his relatives had so far changed during his absence from home, that he no longer advised them, as he had been in the habit of doing, of changes in his affairs, of his plans, and of his movements from town to town. As to him the presumption of life continued, and a finding of death, except under the rules hereafter to be stated, would have contradicted both the pleading and the evidence.

In order that the presumption of life may be overcome by the presumption of death, there must be evidence not merely of absence from home or place of residence for the period of seven years, but there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry. Greenleaf makes the following statement of the rule: 'Among the circumstances material to this issue are the age of the party, his situation, habits, employment, state of health, physical constitution, the place or climate of the country whither he went, and whether he went by sea or land, the facilities of communication between that country and his former home, his habits of correspondence with his relatives, the terms of intercourse on which he lived with them; in short, any circumstance tending to aid the jury in finding the fact of life or death. There must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who probably would have heard of him, if living, and also at the place of his fixed foreign residence, if he was known to have had any.' 2 Greenleaf on Evidence, § 278. Other law books make similar statements. It is conceived, however that the character of the inquiry, that the persons of whom it must be made, and the place of places where it must be made, are all to be determined by the circumstances of the case, with the obligation always upon the person who is to derive a benefit from the death of the absentee, to exclude by the best evidence and with as much certainty as possible reasonable belief that he continues to live. The social aspects of our civilization have been almost revolutionized since the presumption based upon the fact of seven years' unexplained absence was adopted. The improbability that accident, injury, sickness, or death could overtake John Gerdom without information of the fact reaching his family and friends is very great. He scarcely could fail to find assistance in case of need among members of his own fraternity. Hospital provision is now made almost everywhere for the relief of the sick and injured, and careful records of all cases are usually kept, including information concerning the patient himself and the circumstances necessitating his detention. Police and other court records, records of coroner's inquests, records of burial, and other criminal, casualty, and mortuary statistics, collected and preserved in every well-populated state, make it difficult for any interested person to be ignorant of the facts to which they relate. The press gives daily attention to the publication throughout the country of news relating to accidents and crimes whenever they occur. The people generally are alert and well informed. Those of different sections of the country are intimate with each other, and the means of communication between even remote parts is easy, safe and speedy. This being true, the presumption of death from absence cannot have the strong probability of fact as its basis which formerly supported it, and persons who, for their own profit, assume the burden of establishing in courts of justice that the death of an individual has occurred, have little excuse for urging their own isolated ignorance of his fate or his whereabouts as the principal item of their proof.

Even under the rule as stated above it was incumbent upon Joseph and Anna Gerdom to make quest for tidings of their son among his former intimate friends in Topeka, if he had any, and certainly some inquiry of those officers or members of his lodge with whom he might have communicated concerning his dues or standing should have been made. All those persons who in th

ordinary course of events would likely receive tidings if the party were alive, whether members of his family or not, should be interrogated, and the result of the inquiry should be given in evidence, or the testimony of the parties themselves should be produced at the trial. Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. Rep. 1068. See, also, 13 Cyc. 301. Any word received by any one who might naturally be expected to hear at any time within the seven year period destroys the presumption of death, and unless the resources of this field of information have been exhausted an allegation of death cannot successfully be sustained. In this case Joseph Gerdom was the only witness produced to prove want of intelligence from the absentee at his former place of residence, and he spoke for himself alone. His coplaintiff, the young man's mother, and his brothers and sister, were not called. So far as the record shows, John Gerdom may have continued to correspond with his sister for a number of years after leaving Oakland, and may even be in correspondence with her now; and this want of diligence on the part of the plaintiffs themselves in proving due inquiry could not be compensated by the defendant's advertisement."

WORDS "PUT IN TRUST" HELD SUFFICIENT TO CREATE A TRUST.—In the case of Hiles v. Garrison, recently decided by the Court of Chancery of New Jersey, 62 Atl. Rep. 865, a bill was filed by the widow, complainant, for the construction of the will of Richard Hiles, deceased, the relief sought being the appointment of a trustee. The case was one for equitable relief. The pertinent part of the will is the second clause, which reads as follows: "I do devise that all my property and bonds and mortgages be put in a trust, and the income be divided equally between my brother, Biddle Hiles and sister, Caroline Garrison, and my wife, as long as she remains my widow, in case of her marring or deth her share to gowe to my brother. Biddle Hiles, and my sister Caroline Garrison." The testator died possessed of considerable estate; the personalty having been appraised at the sum of $54,039.88. His real property consisted of an undivided interest in certain real estate in the county of Salem in this state, such interest being estimated by the parties in interest at something over $20,000. At the time of his death the only next of kin of the testator was his brother, Biddle, and his sister, Caroline. The will was prepared by the testator, and does not clearly express his desires, and the purpose of the action was to ascertain whether a trust had been established by the terms of such will, and, if so, that a trustee be appointed to carry out such trust. While this will is very inartistically drawn, the court seems to think the clear intention of the testator was to create a trust by the terms of which the income of his estate was to be divided equally between his widow, brother and sister, and that this trust should continue as long as his widow lives or remains unmarried, and on the happening of either such events the trust terminates. As the testator had made no disposition of the *corpus* of the fund after the expiration of the trust estate, he died intestate as to the residue of his property, and it should go to his next of kin. That the testator named no trustee should not prevent the execution of the trust, for the court will always appoint a trustee wherever necessary to sustain the trust, and a trustee will be appointed. The will contained no power of sale, and therefore the trustee could not dispose of the land by virtue of any authority contained in the will. It was, in the judgment of the court, however, included in the trust, and, subject to that made to vest in the heirs at law of the testator.

INJUNCTION AS A REMEDY TO RESTRAIN PASSAGE, TEST VALIDITY AND PREVENT ENFORCEMENT AND VIOLATION OF MUNICIPAL ORDINANCES.

1. Restraining by Injunction the Enactment of Ordinances.
2. Force and Effect of Ordinances when Legislative Acts.
3. Acting in a Sovereign or Proprietary Capacity.
4. Usurpation and Abuse of Power—Legislative Acts.
5. Ministerial Acts.
6. Injunction May be Invoked to Test the Validity of an Ordinance.
7. To Avoid Multiplicity of Prosecutions.
8. To Restrain Violation of Ordinances.

1. *Restraining by Injunction the Enactment of Ordinances.*—Where the enactment of an ordinance by the council or governing legislative body falls clearly under the head of a purely legislative act, the general rule is that equity will not enjoin its passage. This doctrine has been judicially declared frequently by the Supreme Court of the United States,[1] other federal courts,[2] and by many state courts of last resort.[3] The fundamental

[1] New Orleans Waterworks v. New Orleans, 164 U. S. 471, 481; United States v. Des Moines, N. & R. Co., 142 U. S. 510; Angle v. C., St. P. M. & C. R. Co., 151 U. S. 3.

[2] Murphy v. East Portland, 42 Fed. Rep. 308; Alpers v. San Francisco, 12 Sawy. 631, 32 Fed. Rep. 503.

[3] State v. Superior Court, 105 Wis. 651, 81 N. W. Rep. 1046; Detroit v. Hosmer Wayne Circuit Judge, 79 Mich. 384, 44 N. W. Rep. 622; Harrison v. New Orleans, 33 La. 222, 39 Am. Rep. 272; Cape May S. L. R Co. v. Cape May, 33 N. J. Eq. 419; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. Rep. 700; Kittinger v. Buffalo, 160 N. Y. 377; Stevens v. St. Mary's Trainin

principle was aptly stated by the great Chief Justice Marshall in Orsborn v. Bank of United States,[4] wherein he argued that the judicial department has no will in any case; that judicial power, as contradistinguished from the power of the laws, has no existence; and that courts are mere instruments of the law, and, hence, can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the court to follow it. He sums up thus: "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

2. *Force and Effect of Ordinances when Legislative Acts.*—Ordinances, when valid, are as binding on the corporators and the inhabitants residing within the jurisdiction of the municipal corporation as the general laws of the state upon the citizens at large.[5] "The general assembly," says the Supreme Court of Iowa, "is a co-ordinate branch of the city government, and so is the law-making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled."[6] The members of the municipal council or governing legislative body, legally convened for the performance of functions within their jurisdiction, when acting within the limits of the power properly delegated to them by the state, in the apt language of an early Missouri case, constitute a "miniature general assembly," and the law-making power of the state gives their ordinances the force of laws passed by the legislature of the state.[7] Municipal ordinances and state statutes are from a common source of authority. One class presents it in a delegated, and the other in a direct form, "but it is the power of the state which speaks in both."[8]

Courts of last resort have formulated this rule of law in various ways: "An ordinance * * * has the same force and effect of a law passed by the legislature."[9] "The passage of an ordinance is, of course, a legislative act."[10] "When an ordinance is passed * * * it is in force by the authority of the state and is to be interpreted and executed as if it had been passed by the general assembly."[11] An ordinance has precisely the same effect as a legislative act, as it "is expressly authorized by the legislature, and whether it be their act or the act of the local state legislature, makes no difference."[12] Ordinances passed in obedience to the municipal charter "are laws of the state within the municipality, and are binding upon all persons who come within the scope of their operation, unless they conflict with and are not in harmony with the constitution and general laws of the state."[13] "Within the sphere of their delegated powers municipal corporations have as absolute control as the general assembly would have if it never had delegated such powers and exercised them by its own laws."[14] Like views have been expressed by the Supreme Court of the United States.[15] "The authority to enact by-laws is delegated to the city by the sovereign power and the exercise of such authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabi-

School, 144 Ill. 336, 18 L. R. A. 832, 36 Am. St. Rep. 438, note pp. 449-453; 2 High on Injunctions (4th Ed.), § 1243.

[4] 9 Wheat. (U. S.) 738, 866.

[5] Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47; Carthage v. Frederick, 122 N. Y. 268, 271, 19 Am. St. Rep. 490, and note; St. Johnsbury v. Thompson, 59 Vt. 300, 305; State v. Tyron, 39 Conn. 183; State v. Williams, 11 S. Car. 288; Detroit v. Ft. Wayne, Bell Isle Ry., 95 Mich. 456, 35 Am. St. Rep. 580; Bearden v. Madisen, 73 Ga. 134, 186; Tudor v. Chigago and South Side Rapid Transit Co., 154 Ill. 129; Milne v. Davidson, 5 Mart. (U. S.) 409, 16 Am. Dec. 189, with extended note.

[6] Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756.

[7] Taylor v. Carondelet, 22 Mo. 105, per Scott, J.

[8] State v. Vic de Barr, 58 Mo. 395, 397; Albright v. Fisher, 164 Mo. 56, 64, 65, 64 S. W. Rep. 106.

[9] Mason v. Shawneetown, 77 Ill. 533, 537; Lewis v. Denver, C. W. W. Co., 19 Colo. 236, 41 Am. St. Rep. 248.

[10] Moore v. Cape Girardeau, 103 Mo. 470, 476.

[11] St. Louis v. Boffinger, 19 Mo. 13, 15.

[12] Presbyterian Church v. New York, 5 Cow. (N. Y.) 538, 541, per Savage, C. J.

[13] Grand Ave. Ry. Co. v. Citizens' Ry. Co., 148 Mo. 665, 671, 50 S. W. Rep. 505.

[14] Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 509, 24 Am. Rep. 756.

[15] Walla Walla v. Walla Walla Co., 172 U. S. 1.

tants."[16] The rule of the English law appears to be the same. It has been stated by Lord Abinger: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large."[17]

3. *Acting in a Sovereign or Proprietary Capacity.*—In determining the power of the courts to restrain by injunction the passage of ordinances, it should be remembered that municipal corporations are of atwo-fold character: one, governmental or public, as regards the city at large in so far as they are its agents in government, and also in the exercise of governmental or public powers affecting alone the interests of the local community as contradistinguished from state interests, wherein they act in a sovereign capacity; the other, private or proprietary, whereby they provide the local necessities and conveniences for their own citizens, or in other words, wherein they act as a corporate legal individual.[18] The Court of Appeals of Kentucky, in enjoining the enactment of an ordinance seeking to authorize the disposition of certain wharf property, noted the dual character of a municipal corporation, concerning judicial interference of proposed municipal action, by declaring that "the general proposition that a court of equity may not enjoin the passage of a municipal ordinance must be confined in its application to subjects over which the corporation in its governmental or public character has discretionary authority. And if it be conceded taxable inhabitants have a right to resort to equity at all, to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventative remedy may be applied at the inception of a wrongful act; in fact when it is about to be done or threatened."[19]

4. *Usurpation and Abuse of Power—Legislative Acts.*—Courts possess the undoubted power to enjoin the passage of an ordinance which is beyond the scope of power of the local corporation, if it appear that its passage would work irreparable injury, wherein no adequate remedy afforded by the law. The passage of the ordinance in such a case would be a clear usurpation of power.[20] The opinion has been expressed by the Supreme Court of Wisconsin that the interference with the passage of ordinances by courts should be limited to cases where the municipal council has no power to act on the particular subject, legislatively, at all, or where the threatened act is not legislative but purely ministerial, or where such body is clothed with certain powers but threatened to go beyond or outside of such powers and thereby invade the property or property rights of those who complain to the court, where the council by the passage of the ordinance threatens to squander or destroy some fund or property held by it or some of its officials in trust for its its taxpayers and citizens.[21] The usurpation of authority by public bodies may be prevented by courts of equity is a well recognized doctrine. But the courts have never asserted the right to control purely legislative acts of public corporations. In passing an ordinance, legislative in charac ter relating to the police power and importing no private contract or right, "the members of the city council are entitled to the same privileges and prerogatives as belong to

[16] New Orleans Water Works v. New Orleans, 164 U. S. 471, 481.

[17] Hopkins v. Swansea, 4 M. & W. 621. This statement has often been quoted approvingly in this country. State v. Walbridge, 119 Mo. 383, 394, 41 Am. St. Rep. 663, 24 S. W. Rep. 457. The enactment of ordinances and by-laws by local or municipal corporations is not the exercise of legislative power in the sense as exercised by the legislature of the state, declares an early Ohio case. Markle v. Akron, 14 Ohio, 586, 590.

[18] Oliver v. Worcester, 102 Mass. 489; Louisville v. Commonwealth, 1 Duvall (Ky.), 295; Lloyd v. Mayor, etc., of N. Y., 5 N. Y. 369, 374, 55 Am. Dec. 347; Maxmillian v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468; Edgerly v. Concord, 62 N. H. 8; Springfield, etc., Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660; Caspary v. Portland, 19 Oreg. 496, 24 Pac. Rep. 1036.

[19] Roberts v. Louisville, 92 Ky. 95, 107, 13 L. R. A. 844, 17 S. W. Rep. 216, 36 Am. St. Rep. note 449, 453.

[20] Spring Valley Waterworks v. Bartlett, 8 Sawyer, 555, 16 Fed. Rep. 615; Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. Rep. 136; Public Ledger Co. v. Memphis, 93 Tenn. 77, 23 S. W. Rep. 51; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; State v. Patterson, 34 N. J. L. 163; State v. Albright, 20 N. J. L. 644; 2 High on Injunction (4th Ed.), § 1241.

[21] State v. Milwaukee County Superior Court, 105 Wis. 651, 677, 678, 80 N. W. Rep. 1046. Injunction denied except in case of fraud or gross abuse of discretion. Crawfordsville v. Braden, 130 Ind. 149, 30 Am. St. Rep. 214, and note.

members of the state legislature."[22] Neither the motives of the members nor the influence under which they acted, can be shown to nullify an ordinance, duly passed in legal form within the scope of their corporate powers.[23] The legal view is that the members of the council are responsible alone to the people who elect them.[24] Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good and are clothed with all the immunities of government, and are exempted from all liabilities for their mistakes.[25] After fully reviewing the cases on the subject, the Supreme Court of Missouri, in denying the right of the judiciary to restrain the passage of an ordinance, giving a street railway company a right of way in certain streets, thus sums up: "Taking this established doctrine of this court as a basis and a premise, it must needs follow that when the municipal assembly of the city of St. Louis is engaged in the performance of its legislative functions, it is quite beyond the power of the courts to interfere with the exercise of those functions in any way or manner whatsoever whether by enjoining the passage of an ordinance or by mandatorily compelling the presiding officer of either house to make that an ordinance which was not an ordinance theretofore, by appending his unwilling signature thereto. This conclusion is inevitably true while the decisions quoted from stand; and they will continue to stand until and unless you overthrow them by establishing that the municipal assembly of the city of St. Louis, indeed all other similar bodies, do not constitute part and parcel of the legislative department of this state. Inasmuch, therefore, as they do this, they and their presiding officers, for the latter's functions are also legislative,[26] occupy the same plane, the same impregnable exemption from judicial attack as does the General Assembly of the state and its officers, when enacting laws for the whole state. You can not make fish of the one and fowl of the other. Nor can you in this instance, decry the municipal assembly of the city of St. Louis and thus place it outside the pale of constitutional protection from judicial interference, or rather judicial usurpation."[27]

5. *Ministerial Acts.*—This immunity from judicial interference is limited to the acts which are strictly legislative in character; it does not extend to all case of municipal councils and governing legislative bodies, notwithstanding they may assume the form of ordinances. When the members of the council act in ministerial or administrative capacity such acts are subject to judicial review, or when about to be taken, a court of chancery may interfere by injunction.[28]

6. *Injunction May be Invoked to Test the Validity of an Ordinance.*—This remedy has often been applied to prevent the enforcement of void ordinances in cases where it appeared that their enforcement was threatened, and where a showing was made that such action would result in irreparable injury to the property rights of the complainant, and no other adequate remedy was available,[29] as to prevent the invasion of rights of property,[30] to protect vested rights,[31] *e. g.*, to restrain

[22] Villavaso v. Barthet, 39 La. Ann. 247, 258, 1 So. Rep. 599; People v. Crigger, 138 Ill. 401, 28 N. E. Rep. 812; Knoxville v. Bird, 12 Lea (Tenn.), 121. 47 Am. Rep. 323; Soon Hing v. Crowley, 113 U. S. 703, 710, 711.

[23] Freeport v. Marks, 59 Pa. St. 253, 257; Paine v. Boston, 124 Mass. 486, 490.

[24] Doyle v. Continental Ins. Co., 94 U. S. 535; Stuyvesant v. New York, 7 Cow. (N. Y.) 588; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; Kiely v. Forsee, 57 Mo. 390; Lily v. Indianapolis, 149 Ind. 648; State v. Davidson, 50 La. Ann. 1297, 69 Am. St. Rep. 478, 24 So. Rep. 424; Moore v. Haddonfield, 62 N. J. L. 386, 41 Atl. Rep. 946; Wood v. Seattle, 23 Wash. 1, 62 Pac. Rep. 135; Meyer v. Teupolis, 131 Ill. 552, 23 N. E. Rep. 651.

[25] Jones v. Loving, 55 Miss. 109, 111; Baker v. State, 27 Ind. 485, 487; Anne Arundel County v. Duckett, 20 Md. 468; State v. Hays, 49 Mo. 604; Lewis v. Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248.

[26] State v. Mead, 71 Mo. 275.

[27] Albright v. Fisher, 164 Mo. 56, 64, 65, 64 S. W. Rep. 106.

[28] State v. Cincinnati Gas Co. 18 Ohio St. 262, 300; Weston v. Syracuse, 158 N. Y. 274, 43 L. R. A. 678, 53 N. E. Rep. 12. *Certiorari* as a remedy, State v. Jersey City, 34 N. J. L. 390, 398; State v. Paterson, 34 N. J. L. 163, 171; State v. Jersey City, 34 N. J. L. 31, 44; State v. Trenton, 36 N. J. L. 79, 86; State v. Bronson, 35 N. J. L. 468.

[29] Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321, 28 N. E. Rep. 853; People v. New York, 32 Barb. (N. Y.) 35, 10 Abb. (N. Y.) 144, 19 How. Prac. (N. Y.) 155; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. Rep. 648; Athens v. Georgia R. R., 72 Ga. 800; Appeal of Harper, 109 Pa. St. 9, 1 Atl. Rep. 791; Dennison v. Kansas City, 95 Mo. 416, 8 S. W. Rep. 429; Barther v. New Orleans, 24 Fed. Rep. 563.

[30] Guillotte's Heirs v. New Orleans, 12 La. Ann. 479; Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 252.

[31] Cape May & S. L. R. Co. v. Cape May, 35 N. J.

the enforcement of an ordinance, which would interfere with a street railway franchise and property;[32] or an ordinance which would impair the obligation of a contract.[33]

The general rule is that municipal officers may be restrained from attempting to act by virtue of ordinances which may be invalid for any reason,[34] as those imposing illegal license fees,[35] *e. g.*, an illegal ordinance imposing a license tax where a showing is made that the license is void and that in its enforcement the complainant would be compelled to defend a multitude of criminal prosecution and would suffer irreparable injury in his business,[36] or a void ordinance reducing street car fare or water rates,[37] or an illegal ordinance forbidding hauling on certain streets.[38] Ordinarily, courts will not enjoin the enforcement of ordinances if property rights are not invaded;[39] but if the invasion of such rights is threatened and irreparable injury will follow an injunction may be invoked on the part of those about to suffer injury, notwithstanding such threatened acts are punishable as crimes or misdemeanors.[40] Some courts have held, that, the doctrine that criminal statutes cannot be tested or their enforcement restrained in civil courts, has no application to municipal ordinances, since such enactments are not criminal, although penal.[41] The mere ground of alleged illegality of an ordinance usually will not support this remedy, since the remedy by appeal is open to one who may be convicted under it.[42] If an adequate remedy at law exists and it is not shown that irreparable injury to property rights is threatened, equity possesses no jurisdiction in such case.[43]

7. *To Avoid Multiplicity of Prosecutions.*—Injunction to restrain the enforcement of void ordinances has been sustained in order to prevent a multiplicity of prosecutions under it.[44] Such suit will lie at the instances of any person whose interests may be impaired by its enforcement. However a court of equity cannot determine whether the ordinance has been violated, but merely whether it is void. Where injunction is invoked on this ground there must be a right affecting many persons.[45] On this ground tax payers of a town, city, county, or other taxing district, may file a bill to restrain or set aside an illegal general tax, whether personal or made a lien upon their respective property.[46] In

Eq. 419; Platte & D. Canal and M. Co. v. Lee, 2 Colo. App. 184, 29 Pac. Rep. 1036.

[32] Mobile v. Louisville & N. R. Co., 84 Ala. 115, 5 Am. St. Rep. 342 note, 5 So. Rep. 186; Howell v. Tacoma, 28 Am. St. Rep. 87.

[33] Cleveland City Ry. Co. v. Cleveland, 94 Fed. Rep. 395.

[34] Grant v. Davenport, 36 Iowa, 396; Oliver v. Keightley, 24 Ind. 514; Drake v. Phillips, 40 Ill. 388; Normand v. Otoe Co., 8 Neb. 18; Merrill v. Plainfield, 45 N. H. 126.

[35] Southern Express Co. v. Ensley, 116 Fed. Rep. 756; Collins, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. Rep. 907.

[36] Hutchinson v. Beckman (U. S. C. C. A.), 18 Fed. Rep. 399.

[37] Cleveland v. Cleveland City R. Co., 194 U. S. 517, 531, 24 Sup. Ct. Rep. 756, 761; Los Angeles City Water Co. v. Los Angeles, 85 Fed. Rep. 720; Spring Valley W. W. Co. v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046.

[38] Cicero Lumber Co. v. Cicero, 176 Ill. 9, 68 Am. St. Rep. 115, 51 N. E. Rep. 758; Prohibition to test validity of ordinance. Bybee v. Smith, 2 Ky. Law Rep. 467, 1684, 57 S. W. Rep. 789.

[39] Atlanta v. Gate City Gas Co., 71 Ga. 106; Gault v. Wallis, 53 Ga. 675, 677; Moultrie v. Patterson, 109 Ga. 370, 34 S. E. Rep. 600; Garrison v. Atlanta, 68 Ga. 64; Phillips v. Stone Mountain, 61 Ga. 386.

[40] Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. Rep. 1106.

[41] Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. Rep. 649, 51 Am. St. Rep. 566; Kansas City v. Clark, 68 Mo. 588; Comp re, Burnett v. Craig, 30 Ala. 135.

[42] Taylor v. Pine Bluff, 34 Ark. 603; Power v. Des Plaines, 20 Ill. App. 30; Yates v. Batavia, 79 Ill. 500; Gartside v. East St. Louis, 43 Ill. 47; West v. New York, 10 Paige (N. Y.), 539; Schwab v. Madison, 49 Ind. 329; Wertheimer v. Connville, 29 Mo. 254; Scott v. Smith, 121 N. Car. 94, 28 S. E. Rep. 64; Cohen v. Goldsboro, 77 N. Car. 2; Levy v. Shreveport, 27 La. Ann. 620; Golden v. Guthrie, 3 Okla. 128, 41 Pac. Rep. 350.

[43] Denver v. Beede, 25 Colo. 172, 54 Pac. Rep. 624; Scott v. Smith, 121 N. Car. 94, 26 S. E. Rep. 64; Whitney v. New Haven, 58 Conn. 450, 20 Atl. Rep. 666; Power v. Des Plaines, 124 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. Rep. 815; Gartside v. East St. Louis, 43 Ill. 47; Torpedo Co. v. Clarendon, 19 Fed. Rep. 231; Browne v. New Orleans, 38 La. Ann. 517; Morris Canal, etc., v. Jersey City, 12 N. J. Eq. 252; Paulk v. Sycamore, 104 Ga. 24, 41 L. R. A. 772, 30 S. E. Rep. 412; Paul v. Washington, 134 N. Car. 363, 65 L. R. A. 902; Doan v. Board of Comrs., 3 Idaho, 38, 26 Pac. Rep. 167.

[44] Newport v. Bridge Co., 90 Ky. 93; Wilkie v. Chicago, 188 Ill. 444, 80 Am. St. Rep. 183, 58 N. E. Rep. 1004; Holland v. Baltimore, 11 Md. 186.

[45] Power v. Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 494; Chicago, etc., R. R. Co. v. Ottawa, 148 Ill. 395; Pomeroy, Equity Jurisprudence, sec. 245.

[46] Allwood v. Cowen, 111 Ill. 481; Kimball v. Merchants Loan, etc., Co., 89 Ill. 611; Searing v. Heavysides, 106 Ill. 85; Stadler v. Fahey, 87 Ill. App. 411, 414; Sank v. Philadelphia, 4 Brews. (Pa.) 133; St. Louis v. Wenneker, 145 Mo. 230, 47 S. W. Rep. 105; Arnold v. Hawkins, 95 Mo. 569, 8 S. W. Rep. 718; Dennison v. Kansas City, 95 Mo. 416, 8 S. W. Rep. 429; Valle v. Ziegeler, 84 Mo. 214; Ranney v. Bader, 67 Mo. 476; New Meyer v. Missouri & M. R. R., 52 Mo 81, 14 Am. Rep. 395 and note.

order to avoid a multiplicity of suits and have the controversy settled at any one hearing, followers of a particular occupation, as master plumbers, whose rights and liabilities are identical, may join in a suit in equity to restrain the enforcement of an alleged illegal ordinance requiring a license to be obtained, where it appears that the corporate authorities are threatening each of them with prosecution for non-compliance and each prosecution would involve the same right claimed.[47] In a similar case the Supreme Court of Illinois observed: "Their grievance is precisely the same and arises from the same cause. The various parties aggrieved, although not jointly interested, are allowed to sue together for the express purpose of avoiding a multiplicity of suits and to have the controversy settled in one hearing. The municipality is charged with a public trust and where it is about to commit an act clearly illegal, the necessary effect of which will be to impose heavy burdens upon the citizens and tax payers it becomes amenable to the jurisdiction of equity for a breach of trust and such court may interfere by injunction for the prevention of such act. * * * In this case 373 complainants present facts showing that between two hundred thousand and three hundred thousand citizens and taxpayers are affected by the provisions of the ordinance and if compelled to pay the illegal tax hardship and injustice will result to numerous persons. If they pay the tax and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstance, if the license exacted is illegal it would amount to oppression and injustice to a large amount of the population of the City of Chicago and this bill presents a case for the jurisdiction of a court of equity."[48] Where the controversy is between two parties only, or where a few persons are involved, the general rule is that, unless complainants' rights have been established at law, a court of equity will not interfere.[49]

8. *To Restrain Violations of Ordinances.*—For the violation of an ordinance an action to recover the penalty is the usual and only remedy. Therefore the general rule has often been laid down that equity will not restrain by injunction the threatened violation of an ordinance.[50] Yet this remedy was sustained by the Supreme Court of Indiana at the instance of a property owner, to enjoin the removal of a wooden building to a place within the fire limits in violation of an ordinance, where it appeared that such building was to be located dangerously near plaintiff's frame house.[51] And in another case the same court allowed this remedy to prevent the erection of a wooden building in violation of an ordinance within the fire limits by property owners on a showing that the erection would work special and irreparable injury to the complainant and his property.[52]

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[47] Wilkie v. Chicago, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. Rep. 1004, reversing 88 Ill. App. 315.

[48] Chicago v. Collins, 175 Ill. 445, 452, 453, 67 Am. St. Rep. 224, 226, 227.

[49] Power v. Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 495; Chicago, etc., R. R. v. Ottawa, 148 Ill. 397; Yates v. Batavia, 79 Ill. 500.

[50] St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; New Rochelle v. Lang, 75 Hun (N. Y.), 608, 27 N. Y. Supp. 600; Finnegan v. Allen, 46 Ill. App. 553; Manchester v. Smyth, 64 N. H. 380, 10 Atl. Rep. 700.

[51] Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368.

[52] First National Bank v. Sarils, 29 Ind. 201, 28 Am. St. Rep. 185. In California it has been held that the depreciation in the value of land was not such special damage as would sustain an injunction. McCloskey v. Kreling, 76 Cal. 511, 18 Pac. Rep. 433.

BANKRUPTCY—TRUSTEE'S TITLE TO BANKRUPT'S PROPERTY AS AGAINST ATTACHING CREDITORS.

STATE BANK OF CHICAGO v. COX.

United States Circuit Court of Appeals, Seventh Circuit, October, 1905.

Bankruptcy proceedings are *in rem*, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court. When bankruptcy is adjudicated the sequestration reaches all such property, and becomes operative from the institution of proceedings as a caveat to all the world, preventing interference by attachments or other means in derogation of the interests of the estate. While title rests in the bankrupt up to the adjudication, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable.

Where defendant, upon an attachment issued subsequent to the filing of the petition in bankruptcy, but prior to the adjudication, seizes the bankrupt's assets, the trustee subsequently appointed may recover the proceeds, even though they amount to less than the percentage which such attaching creditor would have realized had he filed his claim in the bankruptcy proceedings.

Where two attachment proceedings are begun in Illinois at the same term of court by different creditors, so that, under the local statute, each attaching creditor is compelled to share the proceeds *pro rata*, a trustee in bankruptcy of the attachment debtor, in an action for money had and received, can only recover from each of such creditors the *pro rata* share actually by him received, not the whole sum realized under both attachments.

This is a suit in assumpsit by the trustees in bankruptcy, to recover assets of the bankrupt which were appropriated by State Bank of Chicago, plaintiff in error, through attachment and garnishee process, pending the proceedings in bankruptcy; and the writ of error is from the judgment, upon verdict for $2,692.36, against the bank. The bankruptcy proceedings were in the District Court of the United States for the Western District of New York, against Muskoka Lumber Company, a New York corporation, upon petition for involuntary bankruptcy filed August 20, 1901; and adjudication as a bankrupt was entered May 1, 1902. On August 21, 1901 the plaintiff in error commenced attachment proceedings against the bankrupt, in the Circuit Court of Cook County, Illinois, under which property of the bankrupt was seized and certain of its debtors were served with garnishee process. The John S. Owen Lumber Co. followed with another attachment, through the same attorneys, returnable at the same term, and thus became a pro rating attachment creditor, under the Illinois statute. Sec. 37, chap. 11, 1 Starr & Curtis Ann. Stat., 2nd Ed. Through the attachment on the part of the plaintiff in error the sheriff collected $286.13 and the garnishees paid $2,014.52. Of this aggregate it appears that the share actually received was $1,902.78—the remainder being costs and *pro rata* share of the other attaching creditor. The trustee in bankruptcy brought the present action, against the plaintiff in error alone, May 11, 1903—no claim having been filed or appearance entered on its part in the bankruptcy proceedings—and various questions of pleading were raised, which involve no substantial controversy not otherwise presented for review, aside from jurisdictional features which are referred to in the opinion. Upon issues joined, with the substantial facts undisputed, the case was tried and resulted in a verdict, directed by the court, against the plaintiff in error, for the entire amount so realized and interest, without deduction for the share of the pro rating attachment.

SEAMAN, C. J.: The questions arise for review, (1) whether the trustee in bankruptcy establishes a right of recovery, and if so, (2) whether the true measure of damages was awarded. As the material facts are undisputed, the inquiry is within narrow compass, if not otherwise free from difficulty.

1. Upon the first question the contentions are twofold: (1) that under the present bankruptcy act (section 70) the trustee is vested with title to the property of the bankrupt, "as of the date he was adjudged a bankrupt," so that he cannot recover for property theretofore attached and sold; and (2) that in any view, if such attaching creditor obtained no greater percentage than other creditors of like class, the proceeds were not recoverable as a preference. The attachment processes under consideration were instituted in Illinois on the day following the commencement of the bankruptcy proceedings in New York, but both attachment and appropriation of the proceeds were prior to the adjudication of bankruptcy, and the first mentioned proposition is thus fairly involved. The general purposes and scope of bankruptcy enactments, to take and administer all of the assets of the bankrupt for *pro rata* distribution to the unsecured creditors, is well recognized. In conformity with this view the provisions of the present act, alike with those of the former acts, are uniform—from section 1 (10) to and including section 70 (5)—in fixing the date when the petition was filed as the time bankruptcy jurisdiction is established over the property then possessed by the bankrupt; as the date from which the sequestration of property becomes operative and with reference to which the validity or invalidity of the various transactions affecting the estate must be ascertained. As well remarked by Mr. Chief Justice Fuller, speaking for the supreme court, in Muller v. Nugent, 184 U. S. 1, 14: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403); and on adjudication, title to the bankrupt's property became vested in the trustee (§ § 70, 21*e*), with actual or constructive possession, and placed in the custody of the bankruptcy court." In this court the view is clearly expressed in the opinion by Judge Jenkins, *In re* Rodgers, 60 C. C. A. 567, 578, 125 Fed. Rep. 169: "The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of the creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment." In other words it is the established doctrine that bankruptcy proceedings are *in rem*, and when commenced, all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that when bankruptcy is adjudicated the sequestration reaches all such property, at least, and becomes operative from the institution

of proceedings, as a "caveat to all the world" preventing interference by attachments or other means in derogation of the interests of the estate. *In re* Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. Rep. 308; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 264, 122 Fed. Rep. 593; Loveland's Bankruptcy (2nd Ed.), 366; Collier on Bankruptcy (5th Ed.), 553. While title rests in the bankrupt up to adjudication—and in form until a trustee qualifies—it is subject to the pending sequestration and no rights can be acquired thereunder which are not equally amenable. The formal title of the bankrupt to the estate passes to the trustee (sec. 70*a*) "by operation of law" as of the date of adjudication, but the trustee is vested as well, under subdivisions 4 and 5, with property transferred in fraud of creditors and "property which prior to the filing of the petition" the bankrupt "could by any means have transferred" or which might have been levied upon and sold. Thus the narrow construction of the first mentioned provision, which is sought for escape from liability for the plain violation of the act through the seizure in question, not only ignores these succeeding and comprehensive clauses, but it would nullify the terms and entire policy of the act for the protection of creditors against spoliation of estates subject to bankruptcy proceedings. We are clearly of opinion that such rights of action, arising out of transactions prohibited by the act, vest in and are enforceable by the trustee, unaffected by the date when the legal title passes from the bankrupt to the trustee. *In re* Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. Rep. 308; *In re* Garcewich, 53 C. C. A. 510, 513, 115 Fed. Rep. 87; *In re* Breslauer, 121 Fed. Rep. 910, 914; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 265, 122 Fed. Rep. 593. The question is not raised in Clarke v. Larremore, 188 U. S. 486, but the recovery affirmed in that case could rest on no other view. In reference to the further contention that the proceeds of the attachment and sale gave the plaintiff in error no percentage upon the indebtedness to it beyond that received by other creditors—and thus no preference in fact—it is sufficient to remark that the alleged cause of action does not rest upon the provision relating to preferences, but upon the prohibited seizure and appropriation of property of the estate vested in the court of bankruptcy for administration. Whether the amount realized was more or less than the percentage which might otherwise have been awarded the creditor, cannot enter into consideration.

2. The second objection to the verdict and judgment as predicated on an erroneous measure of damages, must be sustained. In this action the tort was waived for the unlawful seizure and sale of the property and the trustee sued in assumpsit, thus affirming the sale and resting on the implied promise to pay over the proceeds. The general rule is well settled, in such case—and is substantially conceded—that recovery is limited to the amount realized. Morrison v. Rogers, 2 Scammon, 317, 319; McDonald v. Brown, 16 Ill. 32, 33; De Clerq v. Mungin, 46 Ill. 112, 114; Jones v. Hoar, 5 Pick. 285, 290. The amount, however, for which the plaintiff in error is charged by the verdict, includes both the amount received by it, and the share apportioned to the other attaching creditor, under the provisions of sec. 37, chap. 11 of Illinois Statutes (1 Starr & Curtis Ann. Stat. 466), which requires such division between concurring attachments. In support of such award of the entire proceeds the general rule is invoked which makes one wrong doer (through attachment or otherwise) so liable, notwithstanding others joined in the wrong and shared in the proceeds. We are of the opinion that the rule referred to is inapplicable to the case of concurring attachments under this statute, in any view of the effect of waiving the tort. The plaintiff in error had no part in nor control over the other attachments. Proceeding independently it cannot be held answerable for the attachments which followed, with enforced division of proceeds; nor through the fact that all employed the same attorneys. Under the undisputed facts the verdict, as directed, was in excess of the liability of the plaintiff in error, and error is well assigned thereupon. All other assignments are overruled, and for the reason stated the judgment is reversed with direction to grant a new trial.

NOTE.—*Can a Trustee in Bankruptcy Recover from Attaching Creditors Proceeds of an Attachment Made Subsequent to the Filing of the Petition but Prior to the Adjudication.* — Numerous as are the decisions relative to attachments and executions against a bankrupt's assets levied prior to the institution of the bankruptcy proceedings, we are aware of no case antedating State Bank v. Cox in which has been decided the effect of such seizures when made subsequently to the filing of the petition in bankruptcy, but prior to the adjudication. Judgments, attachments and executions, when obtained within four months prior to the filing of the petition, are voided by the Bankruptcy Act, § 67f. On the other hand, a judgment rendered after petition has been filed, has been expressly held (Kinmouth v. Braeutigam, 4 Am. B. R. 344; *In re* Engle, 105 Fed. Rep. 803), is not voided. The principal case seems to conflict with the ruling of the Appellate Court of Missouri in Kennedy v. Pierce Loan Company, 100 Mo. App. 269. See also McFarland Carriage Co. v. Wells, 99 *Id.* As the latest utterance, however, of the court which, short of the United States Supreme Court, is the final arbiter on such questions, we suppose the ruling in the Cox case will hereafter prevail, unless reversed at Washington. A summary of the most important decisions along the line of the principal case may be of interest.

A bankruptcy proceeding is practically a proceeding *in rem*, the design and effect of which is to lay hands upon all the bankrupt's property wherever situated in the United States, and subject the same to the jurisdiction and ultimate judicial process of the bankruptcy court. "Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, as Mr. Justice Grier remarked in Shawhan v. Wherritt, 7 How. 643. And in New Lamp Chimney Co. v. Brass Co., 91 U. S. 662, it was ruled that a decree adjudging a corporation bankrupt in the nature

of a decree *in rem* as respects the status of the corporation." Hanover Bank v. Moyses, 186 U. S. 192; *In re* Wilka, 131 Fed. Rep. 1005; *In re* American Brewing Co., 50 C. C. A. (7th Cir.) 523; Morse v. Godfrey, 3 Story, 391; Stevens v. Mech. Bk., 101 Mass. 109. "The main purpose" say the Ohio Supreme Court, "of the proceeding in bankruptcy is the proper distribution of the estate of the bankrupt among his creditors. The statute directs certain acts to be done and publications to be made for the purpose of affording a reasonable opportunity of notice to the creditors. But the proceedings are at least so far *in rem* that actual notice to the creditors is not essential to the jurisdiction of the court." Rayl v. Lapham, 27 Ohio St. 452; Thornton v. Hogan, 63 Mo. 148.

A corporation is brought into bankruptcy only by involuntary proceedings. In such proceedings there must elapse a substantial period after the filing of the petition and before the adjudication. A subpoena must issue, be served and returned. Time is allowed thereafter for answer, and, if demanded, for a jury trial. In such case the petitioning creditors cannot give notice of the institution of proceedings to others interested, since neither a list of creditors nor of debts or assets can be had until after the adjudication is made. The authority and jurisdiction of the bankruptcy court over the property even before adjudication is recognized by the statute in various ways. Sec. 2, clause 3, authorizes the seizure of property before adjudication. Sec. 2, clause 15, empowers the court before adjudication to enjoin the debtor from disposing of his property. Sec. 69*a* authorizes seizure of the property before adjudication upon a showing that the debtor has committed an act of bankruptcy, or is so neglecting the property that it is deteriorating. Under sec. 63*b* unliquidated claims may be liquidated by application to the bankruptcy court, and thereafter proved and allowed. Under sec. 67*f*, all attachments of judgments, whether obtained with or without knowledge of the insolvency, etc. (*In re* Richards, 37 C. C. A. 634; Severin v. Robinson, 27 Ind. App. 55; Nat'l Bank v. Spencer, 53 App. Div. 547), are voided if obtained within four months prior to petition filed. Among provable debts are (Sec. 63*a*) "taxable costs incurred in good faith before the filing of the petition in an action to recover a provable debt," whereas, where the debt has been "reduced to judgment after the filing of the petition," costs are not allowable. Sec. 63*a* (5). Sec. 11 provides that suits pending against the bankrupt at the time of the filing of the petition, if "founded upon a claim from which a discharge would be a release," shall be stayed until after an adjudication or the dismissal of the petition. Sec. 29*b* (4) makes it a criminal offense for any one to receive "any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act." Sec. 57*n* limits the time for proving claims, fixing one year after adjudication. But if a claim is liquidated by a final judgment within thirty days before or after such period, then such claim may be proved within sixty days after the rendition of such judgment.

From all these and other provisions it seems clear the bankruptcy act means to forbid the bringing of suits against the bankrupt or his property subsequent to the commencement of bankruptcy proceedings, except merely for the purpose of liquidating the claim, stopping the running of the statute of limitations, establishing the creditor's right as against a stockholder or a surety, or the like. The principal cause seems to settle the general proposition that such a suit, for the purpose of seizing the property of the bankrupt and thus wresting it from the jurisdiction or control of the bankruptcy court and appropriating it to the sole benefit of such litigant, violates the whole purpose of the bankruptcy act.

The distinction between Sec. 70*a* of the present act and Sec. 14 of the act of 1867 has been noted as indicating a different purpose. The former, it is true, provides that the estate of the bankrupt shall vest in the trustee as of the date of the adjudication, whereas the latter operated to vest title as of the date of the filing of the petition. With direct reference to Sec. 70 of the existing act, and therefore necessarily having in mind the difference between that act and the law of 1867 with respect to the date of the vesting of title in the trustee, the Supreme Court of the United States said: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction." Mueller v. Nugent, 184 U. S. 14. This language has since been cited and applied to a great variety of causes, all agreeing in the assertion of the jurisdiction of the bankruptcy court over all the property of the bankrupt by the mere filing of the petition, so far as to prevent the creation of any lien thereon adverse to the trustee by means of any action begun elsewhere after that date. In the case of *In re* Granite City Bank, 137 Fed. Rep. 820, it was said: "The filing of the petition in bankruptcy was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him, and vested in the assignee for the purpose of the trust with which he was charged. The bankrupt became, as it were, for many purposes *civiliter mortuus*." This was said by the supreme court in Bank v. Sherman, 101 U. S. 406, in respect of the operation of the bankrupt act of 1867. Mr. Chief Justice Fuller, in Mueller v. Nugent, 184 U. S. 1, 14, said: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction; * * * and on adjudication, title to the bankrupt's property became vested in the trustee, with actual or constructive possession, and placed in the custody of the bankruptcy court." In *Re* Goldberg, 121 Fed. Rep. 578, one Levi, on July 19, 1902, began attachment proceedings against Goldberg, seizing certain goods then in the latter's possession, and on August 1, 1902, obtained an order from the state court authorizing sale thereof. On August 7, 1902, petition was filed by certain of Goldberg's creditors to declare him a bankrupt, but he had fled and adjudication was not had for considerable time thereafter. On August 8, 1902, Levi caused the sale to be had, and the goods were struck off to his son for a grossly inadequate price. Thereupon the bankruptcy court enjoined the son from interfering with or disposing of the goods, the court saying: "It has been decided by the Supreme Court of the United States that the filing of a petition in bankruptcy is notice to all the world of the pendency of the proceeding; that the same is, in effect, an attachment and injunction. Therefore, the sheriff making the sale, the plaintiffs in that action and their attorneys, and the purchaser at the sale had notice of the pendency of the bankruptcy proceeding. * * * In effect the filing of the petition followed by adjudication, gave notice to the sheriffs, and attached this property for the benefit of all the creditors, and enjoined the sheriff and all the world from further proceeding in the attachment

suits. Whoever proceeded thereunder thereafter did so at his peril. If the bankruptcy law is to be respected and enforced, it must be administered according to its letter and spirit. The main intent and purpose of the law is to prevent preferences, except as specially given by the act itself, and one of the modes of obtaining a preference especially condemned is by means of attachment proceedings in the state court. No course of procedure would more surely defeat the law than would the granting of an order vacating this injunction, and the consequent dissipation of the assets." See, also, *In re* Breslauer, 121 Fed. Rep. 910; *In re* Weinger, 126 Fed. Rep. 875; *In re* Moody, 131 Fed. Rep. 527. In *Re* Pekin Plow Co., 50 C. C. A. 257, the statutes of Nebraska provided that chattel mortgages, where there is no change of possession, shall be void "as against the creditors of the mortgagor," unless recorded. The Supreme Court of Nebraska construed the term creditor here to mean "a judgment or attachment creditor, one who is using the courts of law and their processes for the collection of his debt." The court held, that an unrecorded chattel mortgage was void as against the trustee of the mortgagor, appointed in involuntary proceedings, because such trustee represents all the creditors; that all creditors of a bankrupt are necessarily parties to every such (involuntary) proceeding. Said the court: "The proceeding in involuntary bankruptcy is a suit between the bankrupt and all his creditors. Sec. 18*b* provides that 'the bankrupt or any creditor may appear and plead to the petition.' Subdivision *d* of same section provides that 'if a bankrupt or any of his creditors shall appear and controvert the facts alleged in the petition,' the judge shall hear and determine the issue so made. Sec. 59*g* provides that 'a voluntary or involuntary petition shall not be dismissed by the petitioner, either for want of prosecution or by consent of parties, until after notice to the creditors.' These and many other provisions of the act evince an unquestionable intent on the part of Congress to make all creditors of the bankrupt parties to the proceedings when once instituted. The effect of the institution of such proceedings is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts *pro rata* and equally. By the provisions of section 70*a* the trustee, upon his appointment and qualification, is vested by operation of law 'with the title of the bankrupt' to 'all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' It was held in *Re* Burka, 104 Fed. Rep. 326, that by the true interpretation of the last mentioned section 'title is vested in the trustee to all property or rights of property of the bankrupt which existed at the time of the filing of the petition. * * *' From the foregoing provisions of the act it clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors, of all the property of the bankrupt. By such a proceeding the creditors are 'using the courts and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt." In *Re* Frazier, 117 Fed. Rep. 748, commenting on the reason of the rule laid down in *Re* Pekin Plow Co., the court said: "The postulate announced in Mueller v. Nugent, 184 U.S. 14, that the 'filing of a petition is a caveat to all the world and in effect an attachment and injunction,' in the very necessities of the whole scheme and spirit of the bankrupt act, must apply to a voluntary as to an involuntary proceeding. The moment the petition is filed the proceeding is *in rem*. It in legal effect sequesters all of his property interests for the benefit of his creditors, *pari passu*, as if seized under attachment or execution. His whole estate passes *in custodia legis*. *Eo instanti* every creditor of the bankrupt becomes an adversary party in a legal proceeding, and stands as a creditor, seeking the aid of the court of exclusive jurisdiction." See, also, Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 254; *In re* Rodgers, 60 C. C. A. 567. In the last case cited it was said: "Notwithstanding some loose expressions in the decisions upon this subject, we are satisfied that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or incumbered by him in fraud of his creditors. The filing of the petition, followed by seizure and by adjudication, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure by legal process, equal in rank to and of the same force and effect as by execution or attachment." Citing *Re* Pekin Plow Co. and Mueller v. Nugent, *supra*. Here we seem to have the fundamental reason why the trustee, when appointed, is vested with rights more extensive than those of the bankrupt himself, to protect his creditors, to-wit, because "after the filing of the petition, the creditors are powerless to pursue and enforce their rights." In Mueller v. Bruss, 112 Wis. 406, certain lands had been conveyed by the bankrupt, without consideration, to his wife, while in debt. Thereafter bankruptcy proceedings were begun, an adjudication had and a trustee appointed, who thereupon, without obtaining any judgment against the debtor, brought suit against the grantees in the prior conveyances to set the latter aside as in fraud of creditors. Objection was raised that under the Wisconsin law only the holder of a judgment or other lien can bring a creditor's bill. This objection was overruled and the trustee's bill sustained. See also, *In re* Briskman, 132 Fed. Rep. 201; *In re* Antigo Screen Co., 59 C. C. A. 248.

The mere appointment of a receiver does not authorize the latter officer to take from third parties in possession thereof and having an adverse claim thereto, property of the bankrupt. A receiver is a mere custodian to preserve property put into his possession. He has no title, nor even a trustee's power to sue for such property. *In re* Kolin, 67 C. C. A. 483. Nevertheless, in the last case (one of involuntary bankruptcy, where the adjudication had not been made at the time the receiver took possession) Judge Jenkins said: "A receiver or trustee stands in like plight with attaching creditors. The filing of the petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction." See also, *In re* Tweed, 131 Fed. Rep. 358. It was said in the case of *In re* Trine, 115 Fed. Rep. 915: "In weighing the effect of the adjudication upon the attaching court's possession by reason of the annulment of levy, we must not confound title and right of possession. The legal title is often in one man and the right of possession in another. It is true the bankrupt's title passes to the trustee 'as of the date of the adjudication,' but where forbidden liens, which the law annuls, are concerned, the adjudication determines the

right of possession, not only 'as of the date of adjudication,' but within four months prior to the filing of the petition. In the eye of the law no right of possession can result from a void levy; and the possession, as well as the right of possession, thus acquired, are, by force of the statute and the adjudication, put either in the bankrupt or the trustee, for the attaching creditor can take nothing by his void levy." See also, Beach v. Macon Gr. Co., 116 Fed. Rep. 143; *Re* Jersey Island P'kg. Co., 138 Fed. Rep. 625; *Re* Mertens, 131 Fed. Rep. 515; *Re* Porterfield, 138 Fed. Rep. 195; Hanson v. Stephens (Ga.), 42 S. E. Rep. 1028; Kinmouth v. Brætigam, 63 N. J. Eq. 103.

It seems clear that if, in the principal case, any of the petitioning creditors had known in time of the existence of the property attached, they would have been entitled, on application to the bankruptcy court, to an injunction to prevent the bankrupt itself from disposing of this property and also to forbid the bank in the principal case from interfering therewith or continuing the prosecution of its attachment proceedings to the point of selling same. If, for lack of territorial jurisdiction, the District Court in New York could not make its process effective for such purpose, the creditors would have had the right to the same relief from a court at Chicago. *In re* Schrom, 97 Fed. Rep. 760; *In re* Williams, 9 Am. Rep. 744. But such right to an injunction on the part of petitioning creditors seems utterly inconsistent with the existence of a right on the part of the attaching creditor to withhold the proceeds of such sale from the trustee, when appointed, whatever may be the title of a *bona fide* purchaser to goods purchased under such attachment sale. The remedy by injunction in such case is not afforded because there is no remedy at law, but because an injunction is more certain and effectual and prompt, a consideration of great value where the interests of all demand a speedy administration of the assets.

Chicago, Ill. WILLIAM RITCHIE.

JETSAM AND FLOTSAM.

LINCOLN'S CONTEST WITH THE ILLINOIS CENTRAL RAILROAD OVER THE REASONABLENESS OF PROFESSIONAL FEES.

Perhaps the most important cause Abraham Lincoln ever handled was that known as The Illinois Central v. McLean County, 17 Ill. 291. This was an action brought against McLean county to restrain the collection of certain taxes alleged to be due from the railroad, growing out of the fact that the Illinois legislature had granted the corporation exemption from all state taxes on condition that it pay seven per cent. of its gross earning into the state treasury. The county authorities, however, claimed that this provision did not preclude them from taxing so much of the railroad's property as lay within their respective jurisdictions, and a great legal battle ensued. The issue was a vital one for the corporation, for the claims of the county threatened it with bankruptcy, and railroading in Illinois was then in the experimental stage. Lincoln conducted the defense with rare skill but lost in the first court. He instantly appealed the case to the supreme court, however, and there it was twice argued before a final decision was recorded in favor of the road at the end of two years' litigation. This celebrated case was provocative of another which has become even more famous with the passing years, for the Illinois Central declined to pay Lincoln's bill of two thousand dollars for services rendered in the tax matter, and he promptly withdrew his account and sued his ungrateful client for six thousand. On the trial of the action all the leaders of the Illinois bar—O. H. Browning, N. B. Judd, Isaac Arnold, Grant Goodrich, Archibald Williams, Judge Norman Purple, and Judge Logan—testified that Lincoln's amended bill was reasonable, and the jury promptly brought in a verdict of five thousand dollars and costs.

It is interesting to note Lincoln's attitude and conduct in this irritating litigation. When the case was first called for trial, no one appeared on behalf of the railroad, and judgment was awarded the plaintiff by default; but notwithstanding the treatment he had received from the company, Lincoln agreed that the case might be reopened, thus allowing the defendant to have its day in court without penalty, and when the above-mentioned verdict was rendered, he agreed to have it set aside because he had forgotten to introduce proof of two hundred dollars which had been given him as a retainer, and the final verdict was recorded at forty-eight hundred dollars and costs. Incidentally it may be mentioned that the services for which Lincoln was obliged to sue would to-day cost the corporation not five but fifty thousand dollars.

It is only fair to state that within the last few years the Illinois Central Railroad has issued an elaborate pamphlet giving its side of the case, and undertaking to show that Lincoln's bill was not certified out of deference to the board of directors, who might have been censured for voluntarily paying so large a charge against the company, and that the trial was merely a formtaliy. Lincoln's unusually careful brief on the law and the facts, however, does not bear out the contention that the litigation was friendly, and this suggestion came as a complete surprise to a number of those who were present when the jury brought in their verdict, and who gave the writer the benefit of their personal recollections of the trial.—*Century Magazine.*

CORRESPONDENCE.

LIABILITY OF THE LESSOR OF A RAILROAD FOR THE LESSEE'S NEGLIGENCE.

Editor of the Central Law Journal:

In your issue of the 9th inst., you have an article by Cyrus J. Wood of Chicago, Ill., on "Liability of Lessor Railroad for Lessee's Negligence Resulting in Injury to Latter's Employee." On p. 182 it is asserted that the Supreme Courts of Illinois, North Carolina and a number of other states hold the lessor liable for the torts of the lessee, to its employees, and to this statement is appended a list of cases in note 9. Among these are a number of cases, among others the case of Banks v. The Georgia R. R. & Banking Co., the same being the case of an employee of the lessee company bringing suit for an injury caused by the negligence of a co-employee. None of the Georgia cases cited support the doctrine stated in the article. In fact, every one of them hold directly the opposite doctrine.

The head note to the Banks case, 112 Ga. 655, written by the court, is a fair statement of the Georgia doctrine, and is as follows:

"A chartered railroad company which, under legislative authority, leased its tracks and franchises to another such company, is not liable for the homicide of an employee of the latter, caused by the negligence of a co-employee."

WILLIAM H. TERRELL.

Atlanta, Ga.

SAME SUBJECT—ANSWER OF MR. WOOD.

Editor of the Central Law Journal:

Mr. Terrell's kind and courteous criticism of my article which you published March 9, 1906, Vol. 62, No. 10, and which related to the liability of the lessor of a railroad for the lessee's negligence, was read with great care and interest. Immediately following the citation of the Banks case, I inserted the words "a case of a co-employee" and it was my expectation that this would indicate to the reader that the Banks case was to be distinguished from the other cases, particularly from some of the other Georgia cases. If Mr. Terrell had passed beyond the syllabus of the Banks case and read in the opinion on page 657, he would have read the following: "There is great contrariety of judicial opinion in respect to the responsibility to the public of a lessor railroad company for the acts of the lessee's servants in operating the franchise where the lease is authorized by statute, but without a provision for the lessor's exemption from liability. We apprehend, however, that no case can be found where it is held in the absence of a statute creating the liability, that a proprietary railroad company which has, by legislative authority, leased its road and franchise, is responsible for a tort to an employee of the lessee resulting from the negligence of a co-employee. In Macon & Augusta Railroad Co. v. Mayes, 49 Ga. 355, it was held: 'Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road the company owning the road, and to which the law has entrusted the franchise, is liable for any injury done as though the company owning the road were itself running the cars.' In that case the company owning the road was held liable for a tort to an employee of the company using the franchise occasioned by the negligence of his co-employee, but there was no legislative authority for the latter company to use the franchise, indeed, there was no lease at all. And therein lies the marked distinction between that case and the one in hand." Toward the conclusion of the opinion it is said: "The conclusion we have reached is that the present case under its facts is not controlled by the rulings made in the case of Macon & Augusta Railroad Co. v. Mayes, 49 Ga. 355, and Singleton v. Southwestern Railroad Co., 70 Ga. 467, but is governed by the decision in Jones v. Georgia Southern Railroad Co., 66 Ga. 558."

It will be seen by the above quotations that the Banks case does not overrule the Mayes and Singleton cases, and, consequently, upon due consideration I determined to put all of the Georgia cases in the class holding generally that the lessor is liable. In this I may have made a mistake, but Mr. Terrell has not yet convinced me of error. It would require an article of considerable length to discuss the fine distinctions made in the Georgia cases on the subject under consideration, and I wish that Mr. Terrell would write such an article and give me an opportunity to criticise it.

CYRUS J. WOOD.

Chicago, Ill.

BOOK REVIEWS.

MCQUILLIN ON INSTRUCTIONS TO JURIES.

The author of the recent and very important treatise on the Law of Instructions to Juries in Civil Cases, Eugene McQuillin, is not unknown to the bar of this country. On the contrary his recent work on Municipal Ordinances, has brought him into national prominence as a law writer, whose name to a book as author, carries with it the instant conviction that the book is well and conscientiously edited. Such also can confidently be said of this most recent work of Mr. McQuillin on Instructions to Juries in Civil Cases. The first part of this work treats generally of the law of instructions and is covered in six splendidly written chapters which offer to the student and practitioner a most valuable explanation and exhaustive analysis of the nature, purpose, provision and value of proper instructions to juries in civil cases. This part of the work covers 316 pages and could be read with profit by every practitioner. The second part is devoted to setting out verbatim the forms in particular actions of instructions which have been approved or disapproved by the appellate courts of Missouri, thus to this extent, making the work primarily one for Missouri lawyers.

No lawyer who ever has occasion to try a jury case can afford to be without this very valuable work. A lawyer who has gone through one hotly contested jury case, or one in which the law and the facts were much in doubt, has no need that we impress him with the value of a work of this kind. Often, as Mr. McQuillin wisely adverts in his preface, in the hurry and confusion of a sharply contested trial, some of the plainest of these well established rules are overlooked, and the inevitable result is the reversal of the case, and the loss of the fruits of a well-earned victory. Indeed, under the circumstances just stated, it is not always easy for the most expert practitioner to draft a series of instructions off-hand, that will pass judicial scrutiny on appeal. The lawyer with a good case should be the most careful of his instructions; but we find so often that the reverse is the case, and attorneys with cases which they would have won without any instructions reverse their own case by asking erroneous or loose-worded instructions which the trial court does not often take the pains to correct. Our examination of this great work has been an intense pleasure to the writer, strange as this statement may seem in regard to a work on the subject of instructions. But, by a careful perusal of the instructions approved and disapproved by courts in cases apparently identical, we have been led to recognize the minute accuracy of common law logic, which requires that every word in an instruction to the jury be carefully chosen with close regard to its full and exact meaning, and to prohibit with a stern refusal the introduction into the balances of a single consideration, which, however apparently relevant to the case, such testimony might appear, to a layman, is not reasonably included within the narrow compass of the issues raised by the pleadings. We say that our observation of these close and accurate distinctions, so often mistaken by superficial laymen, and even lawyers, as technicalities of the law, has given us more implicit confidence in the common law as the most perfect standard of justice ever raised or conceived by the brain of man. Mr. McQuillin, in editing this splendid work on instructions, has performed his task well and should be rewarded by the bar for thus placing them under obligations to him in thus lightening their labors at the temporary increase of his own. Indeed, so extensive have been Mr. McQuillin's efforts in making this work invaluable, at least to the Missouri bar, that a lawyer engaged in the trial of a case, is enabled to pick out on a minute's notice the proper instruction in any given case by referring to the subject matter of law involved in that

case, as it is arranged under Mr. McQuillin's alphabetical classification of forms in particular actions, and changing the form to suit the particular facts of his case. We cannot commend this work too highly to the lawyer who at any time expects to try a jury case in the courts of Missouri.

Printed in one large volume of 1,260 pages and published by the Gilbert Book Co., St. Louis, Mo.

MISSOURI DIGEST (AMERICAN DIGEST CLASSIFICATION.)

The gradual, perhaps unnoticed, certainly not resisted advance, or as it might probably be termed, encroachment of the American digest system into the field hitherto occupied by local state digests, is a movement rivalling in the magnitude of its importance the supplantation of local state reports by the national reporter system. We do not, however, regard this further extension of the American digest system with any great alarm. On the contrary, we believe it to be the legitimate consummation of the idea contained in the recommendation of the American Bar Association in 1900, that the American digest classification become the standard of perfection for all legal indexes and local digests. The truth of the business is that lawyers have become so familiar with the American digest classification that any other system, in digest or text-book, whatever may be its claims to superiority, is regarded with irritation, as necessitating the employment of valuable time in familiarizing oneself with the new classification in order to make proper use of the work itself. It needs but a moment's reflection to convince any one that one system of classification, even if not the most logical for all digests, is better than a different system for every different text-book and digest, even if many of these systems have points of superiority over the older and universal system.

Holding, as we do, such convictions on this subject, we could not but regard with satisfaction the appearance of a digest of Missouri cases, based on the American digest classification; and not only in the interest of Missouri lawyers but of the members of the bar of those western states which have taken so much of their statute law from the Missouri code and must, therefore, rely necessarily, to some extent, on the construction of such statutes by the Missouri Supreme Court. This new Missouri digest is contained in ten massive volumes, one of the largest state digests in the country, evidencing not only the thoroughness and exhaustiveness of the compiler's efforts, but also the wide range of judicial decision in the state of Missouri, a state which has commanded the services of some of the best legal minds of the age, including such names as Thomas E. Sherwood, Roderick E. Rombauer and Seymour D. Thompsom. To open up to the bar the United States as well as that of Missouri the rich stores of legal erudition that lies crystallized in the pages of the Missouri reports, is to do a service to the profession of this country which should be promptly recognized and rewarded. We have examined this digest critically. We have compared its digesting of certain particular cases with which we were familiar, and were delighted to find that the digester who formulated the statements of the points decided in the various cases, had so accurately perceived every point of actual decision and had so far succeeded in avoiding classifying mere "dicta" or expressions of individual judicial opinion as actual decision, that we were unable to suggest an amendment. Moreover, the points suggested we have found to be quite succinct and very clearly expressed, differing in this respect from the statements digested in many state digests which very often perplex and confuse the student with loosely constructed and involved sentences. In point of the exhaustiveness with which this digest has digested the cases, we have found it to be wholly above criticism. It is impossible for the reviewer to say with absolute certainty whether every case has been digested or whether every point decided in every case has been digested, but when, after taking a number of cases at random and putting the work to the test by noting whether the points of decision in all these particular cases have been appropriately and fully digested, we find that this digest has withstood this severe test, we are able to draw the legitimate conclusion that the other cases have been equally well digested and that the work is therefore practically exhaustive. The profession in Missouri is to be heartily congratulated on the rich inheritance it has become the beneficiary of in this new digest.

Printed in 10 large volumes, bound in full sheep, and published by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Supplement to Pattison's Digest of Missouri Reports, embracing Volumes 169 to 185 of the Supreme Court Reports, and Volumes 95 to 108 of the Reports of the Courts of Appeals. Volume VII. By Everett W. Pattison, of the St. Louis Bar. St. Louis, Mo. The Gilbert Book Co., 1906. Sheep. Price $7.50 Review will follow.

A Treatise on the Law of Instructions to Juries in Civil Cases with Forms, Approved by the Courts of Missouri. By Eugene McQuillin, of the St. Louis Bar. The Gilbert Book Company, St. Louis. 1906. Sheep. Price $7.50. Review in this issue.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Action for Personal Injuries.—A cause of action for personal injuries survives the death of the injured person, and may be prosecuted by his personal representatives for the benefit of his general estate.—Nemecek v. Filer & Stowell Co., Wis., 105 N. W. Rep. 225.

2. ACTION—Ejectment.—Under Rev. St. 1899, § 605, an action at law in which an equitable defense is interposed, accompanied by a prayer for affirmative equitable relief, held an equity case triable to a chancellor.—Shaffer v. Detie, Mo., 90 S. W. Rep. 131.

3. ACTION—Wrongful Repledge by Pledgee.—An action by a party to a contract under which bonds were pledged with defendants to recover for a wrongful repledge held one sounding in tort.—Interurban Const. Co. v. Hayes, Mo., 89 S. W. Rep. 927.

4. ANIMALS—Estrays.—Where a person taking up an estray fails to observe all the requirements of the estray law, he is a trespasser, and can claim no lien. — Mills v. Fortune, N. Dak., 105 N. W. Rep. 235.

5. APPEAL AND ERROR—Amending Record.—On presentation of an amendment of the record showing that the appeal and *supersedeas* bond was in accordance with the order of the trial court, held the appeal, dismissed for insufficiency of the bond, would be reinstated.—Ames v. Kinnear, Wash., 82 Pac. Rep. 994.

6. APPEAL AND ERROR — Amendments Regarded as Made.—Where plaintiff was entitled to amend his complaint to correspond with the proofs on appeal, the amendment would be regarded as made.—Irby v. Phillips, Wash., 82 Pac. Rep. 981.

7. APPEAL AND ERROR—Assignments of Error.—Where an assignment of error is unintelligible and is not supported by statement following it, it will not be reviewed. —Houston & T. C. R. Co. v. Bath, Tex., 90 S. W. Rep. 55.

8. APPEAL AND ERROR—Conflict in Abstracts.—In case of a conflict between appellant's abstract, and respondent's additional abstract, the supreme court may examine the original record.—Wood v. Saginaw Gold Min. & Mill Co., S. Dak., 105 N. W. Rep. 101.

9. APPEAL AND ERROR—Discretion of Court in Granting New Trial.—It is the duty of the trial judge on motion for new trial to exercise his discretion and grant a new trial if he does not believe that the verdict is the correct conclusion from the evidence.—Ruppel v. United Railroads of San Francisco, Cal., 82 Pac. Rep. 1073.

10. APPEAL AND ERROR—Estoppel to Allege Error.—Where the parties agreed that witnesses might be examined by the court in the absence of parties and counsel, one of the parties could not, on appeal, object to this procedure. — Dawson v. Dawson, Wash., 82 Pac. Rep. 937.

11. APPEAL AND ERROR—Findings of Fact.—A finding on a presumption of fact cannot be disturbed, unless, indulging all reasonable presumptions, it is clearly contrary to the preponderance of the evidence. — Chase v. Hinkley, Wis., 105 N. W. Rep. 230.

12. APPEAL AND ERROR—Findings Subsequent to Decree.—The supreme court on appeal will not consider special findings of facts made and filed by the trial court after entry of its decree.—Shaffer v. Detie, Mo., 90 S. W. Rep. 131.

13. APPEAL AND ERROR—Matters not Apparent of Record.—A city ordinance not admitted in evidence in a suit to foreclose a lien for a municipal improvement cannot be regarded on appeal from a judgment foreclosing such lien.—City of North Yakima v. Scudder, Wash., 82 Pac. Rep. 1022.

14. APPEAL AND ERROR — Notice of Appeal. — Notice of appeal from a judgment given by a married woman held to inure to the benefit of her husband and the sureties on her replevin bond against whom the judgment was rendered.—Wandelohr v. Grayson County Nat. Bank, Tex., 90 S. W. Rep. 180.

15. APPEAL AND ERROR—Ownership in Action for Damage to Shipment.—Where, in an action against a carrier for damages to a shipment, the evidence showed plaintiff to be the owner of a part of the goods, but the evidence was not sufficient to enable the court, on appeal, to separate the damages, a judgment for plaintiff would be reversed.—Atchison, T. & S. F. Ry. Co. v. Dawson, Tex , 90 S. W. Rep. 65.

16. APPEAL AND ERROR—Review of Order.—An appellate court in reviewing an order granting a new trial is not confined to the ground on which the trial court based the order, but may sustain it on any other assigned ground.—Houghton v. Market St. Ry. Co., Cal., 82 Pac Rep. 972.

17. APPEARANCE—Objection to Jurisdiction.—If a party who contends that a court has no jurisdiction over his person files a motion for a new trial, he thereby concedes that the court has power to act.—Tootle-Weakley Millinery Co. v. Billingsley, Neb., 105 N. W. Rep. 85.

18. ARBITRATION AND AWARD—Effect Pending Action. —Action dismissed on agreement to submit matter in dispute to arbitration, notwithstanding failure to comply with agreement.—Thompson v. Turney, Mo., 89 S. W. Rep. 897.

19. ASSIGNMENTS — Interest in Contract. — A certain agreement between a subcontractor for the construction of a railroad and one who undertook to make him advances held not an assignment of any claim of the subcontractor for work done under his contract.—Interurban Const. Co. v. Hayes, Mo., 89 S. W. Rep. 927.

20. ATTORNEY AND CLIENT—Action for Services. — In an action for attorney's services, a complaint, alleging performance of the service at defendant's special request, held not objectionable for failure to allege a promise to pay.—Cusick v. Boyne, Cal., 82 Pac. Rep. 985.

21. ATTORNEY AND CLIENT—Authority of Infant's Attorney.—Under Ballinger's Ann. Code, § 4766, in relation to the power and authority of attorneys, held that an attorney for plaintiff, in an action by a minor by his guardian *ad litem*, has authority to satisfy a judgment.—State v. Ballinger, Wash., 82 Pac. Rep. 1018.

22. BAIL—Excessive Amount. — Requiring bail in the sum of $400 for each violation of local option law charged held erroneous and subject to reduction to $100 in view of Const. art. 1, § 13, providing that excessive bail shall not be required.—*Ex parte* Finn, Tex., 90 S. W. Rep. 29.

23. BANKRUPTCY—Action by Trustee.—A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings.—Tootle-Weakley Millinery Co. v. Billingsley, Neb., 105 N. W. Rep. 95.

24. BENEFIT SOCIETIES—Mandamus by Expelled Member to Compel Reinstatement.—Expelled member of fraternal insurance society held not entitled to assert in *mandamus* proceeding to compel reinstatement that charges were too general.—Kelly v. Grand Circle Women of Woodcraft, Wash., 82 Pac. Rep. 1007.

25 BENEFIT SOCIETIES—Prohibited Occupations.—In an action on a mutual benefit certificate, held, that the certificate remains in full force except as to the hazard of a prohibited occupation.—Abell v. Modern Woodmen of America, Minn., 105 N. W. Rep. 65.

26. BILLS AND NOTES—Parties to Transaction.—Certain checks held to represent transactions between plaintiff and drawer of the checks individually, although the latter was an officer of defendant corporation.—Sheldon Canal Co. v. Miller, Tex., 90 S. W. Rep. 206.

27. BONDS—Authority to Fix Amount of Bail Bond.—A bail bond, the amount of which was fixed by the war-

rant and bond clerk of the city of San Francisco without authority, held unenforceable as a common-law obligation.—City and County of San Francisco v. Hartnett, Cal., 82 Pac. Rep. 1064.

28. BOUNDARIES—Duty of Surveyor on Resurvey.—A surveyor in resurveying land according to a former survey can only relocate the corners and lines as located on the ground by the first surveyor.—Pereles v. Gross, Wis., 105 N. W. Rep. 217.

29. CARRIERS—Authority of Agent —A local freight agent of a railroad ordinarily has no authority to bind the railroad to carry freight beyond its line.—Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards, Tex., 89 S. W. Rep. 968.

30. CARRIERS—Carriage of Live Stock. —Measure of damages for failure of carrier to promptly deliver cattle on arrival at destination stated.—Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co., Tex., 90 S. W. Rep. 189.

31. CARRIERS — Connecting Carrier. — In an action against a connecting carrier for injuries to cotton, it was no defense that the last carrier by the exercise of care could have prevented the development of the injuries.—Houston & T. C. R. Co. v. Bath, Tex., 90 S. W. Rep. 55.

32. CARRIERS — Contracting Against Negligence. — A railroad cannot contract in a shipping contract against its own acts of negligence.—Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co., Tex., 90 S. W. Rep. 189.

33. CARRIERS—Delay in Delivery of Freight.—A common carrier held bound to provide for the delivery of freight to consignees at destination, and to take the property, after arrival, to such point, and place it in a position of accessibility.—Russell Grain Co. v. Wabash R. Co., Mo., 89 S. W. Rep. 908.

34. CARRIERS—Injury to Passengers by Servants.—A carrier is liable to a passenger waiting at a depot for a train for injuries proximately resulting from the improper acts of the servant in charge of the depot. Gulf, C. & S. F. Ry. Co. v. Luther, Tex., 90 S. W. Rep. 44.

35. CARRIERS—Presumption of Negligence.—Evidence that a passenger in a street car was injured without negligence on her part by a collision between the car and a truck raises a presumption of negligence against the carrier.—Houghton v. Market St. Ry. Co., Cal., 82 Pac. Rep. 972.

36. CARRIERS—Requesting White Passenger to Ride in Coach for Negroes.—A white passenger required to leave car for white persons held entitled to compensation for trouble of leaving car and returning to it, or to punitive damages in the discretion of the jury if brakeman was insulting to her.—Southern Ry. Co. in Kentucky v. Thurman, Ky., 90 S. W. Rep. 240.

37. CARRIERS—Who are Passengers.—Persons taking passage on a train held to be passengers from the time they were put in a car kept near the station to await the train.—Missouri, K. & T. Ry. Co. of Texas v. Byrd, Tex., 89 S. W. Rep. 991.

38. CHATTEL MORTGAGES—Validity of Release.—Where it appears that the mortgagee has taken advantage of the necessities of the mortgagor to secure a release of the mortagor's equity of redemption, or that the consideration is grossly inadequate, the release will be disregarded.—Collins v. Denny Clay Co., Wash., 82 Pac. Rep. 1012.

39. COMMERCE—Taxation of Merchandise.—The assessment of merchandise of nonresidents consigned to a resident owner and by him stored for future delivery to the purchasers is not an interference with interstate commerce.—Merchants' Transfer Co. v. Board of Review of City of Des Moines, Iowa, 105 N. W. Rep. 211.

40. CONSTITUTIONAL LAW — Act Regulating Loans on Chattel Mortgages.—Act March 20, 1905 (St. 1905, p. 422 ch. 354,) regulating loans on chattel security, held void under U. S. Const. Amend. 14, as denying equal protection of the laws.—*Ex parte* Sohncke, Cal., 82 Pac. Rep. 956.

41. CONSTITUTIONAL LAW—Condemnation of Land for Irrigation Ditches.—Rev. St. 1899, §§897-900, providing for condemnation of land for irrigation ditches, held in violation of Const. art. 1, §6, prohibiting the taking of property without due process of law.—Sterritt v. Young, Wyo., 82 Pac. Rep. 946.

42. CONSTITUTIONAL LAW—Free Speech.—The constitutional right of free speech held not to authorize the members of a labor union to boycott the proprietor of a business by threats, acts of intimidation, etc., directed toward his prospective customers.—Jorhahl v. Hayda, Cal., 82 Pac. Rep. 1079.

43. CONSTITUTIONAL LAW — Statutes Affecting Evidence.—It is competent for the legislature to make official determinations or certifications *prima facie* proof of the facts determined or certified to.—Andricus' Adm'r v. Pineville Coal Co., Ky., 90 S. W. Rep. 283.

44 CONSTITUTIONAL LAW—Title to Ice on Navigable Stream.—The substitution of one public use to the exclusion of other public uses is not an invasion of the right of property within the meaning of Const. U. S. Amend. 14, or Const. Iowa art. 1, § 18.—Board of Park Com'rs of City of Des Moines v. Diamond Ice Co., Iowa, 105 N. W. Rep. 203

45. CONTRACTS—Confidential Relations.—Where confidential relations are shown to exist between parties to a transaction, the burden of showing good faith in the transaction is upon the party asserting it.—Landis v. Wintermute, Wash., 82 Pac. Rep. 1000.

46. CONTRACTS—Restraint of Trade —A contract, binding a seller of a business in a town not to engage in the business there, held not void as in restraint of trade.—W. S. Wolverton & Son v. Bruce & Butt, Ind. Ter., 89 S W. Rep. 1018.

47. CONTRIBUTION—Liquidation of Joint Debtor.—Where two or more persons are jointly liable on an obligation, and one of them makes payment of the whole, the obligation is thereby extinguished. — Enscoe v. Fletcher, Cal , 82 Pac. Rep 1075.

48. CORPORATIONS—Allotment of Stock.—The fact that a stockholders' meeting at which stock is allotted between the stockholders is not regular is immaterial where all the stockholders are present and concur in the allotment.—Sheldon Canal Co. v. Miller, Tex., 90 S. W. Rep. 206.

49. CORPORATIONS—Liability on Bonds.—A vendor's claim for rents in possession of an administratrix of the deceased purchaser under her replevy bond held not a claim against the estate of the purchaser.—Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co., Tex., 90 S. W. Rep. 197.

50. CORPORATIONS—Powers of President.—President of mining corporation, who is acting for corporation in securing patents for its mining ground, may bind the corporation by contracts necessary to expedite the obtaining of patents.—Wood v. Saginaw Gold Min. & Mill. Co., S. Dak., 105 N. W. Rep. 101.

51. COSTS—Action on Bond.—Sureties on cost bond on a judgment against their principal are liable for all costs made by the opposite party.—Downs v. P. R. & P. L. Growney, Mo., 90 S. W. Rep. 119.

52. COUNTIES—Restraining Payment of Warrants.—An action to restrain the payment of county warrants cannot be maintained where the holders of the warrants are not made defendants.—State v. Gormley, Wash., 82 Pac. Rep. 929.

53. COURTS—Habeas Corpus.—On application for writ of *habeas corpus* the supreme court cannot review evidence on which the court of civil appeals adjudged relator guilty of contempt.—*Ex parte* Reid, Tex., 89 S. W. Rep. 956.

54. COURTS—Judicial Notice.—The courts will take judicial notice of the fact that a particular county is of a certain class under the statutory classification.—Alameda County v. Dalton, Cal., 82 Pac. Rep. 1050.

55. CREDITORS' SUIT—Limitations.—As a party cannot maintain a creditor's suit until his claim has been reduced to judgment, until judgment is obtained limitations will not run against such a suit.—Ainsworth v. Roubal, Neb., 105 N. W. Rep. 248.

56. CRIMINAL EVIDENCE—Declarations of Defendant.—In a prosecution for burglary, declarations of defendant held admissible as indicative of his presence at the time

and place of the burglary, and of his connection with another who committed the breaking.—Coleman v. State, Tex., 89 S. W. Rep. 828.

57. CRIMINAL EVIDENCE—Exhibiting Weapons to Jury.—It is competent on a trial for assault with intent to murder to exhibit to the jury the weapon with which the alleged assault was made.—Jackson v. State, Tex., 90 S. W. Rep. 34.

58. CRIMINAL EVIDENCE—Homicide.—In a prosecution for murder, permitting a witness who was wounded in the fight in which deceased was killed to exhibit to the jury the scar resulting from the wound held not error.—Alarcorn v. State, Tex., 90 S. W. Rep. 179.

59. CRIMINAL EVIDENCE—Homicide.—In a prosecution for homicide, evidence as to conversations between a brother of defendant and a witness in deceased's restaurant in defendant's absence was inadmissible.—State v. Woodward, Mo., 90 S. W. Rep. 90.

60. CRIMINAL EVIDENCE—Homicide.—When a part of a conversation between a witness and decedent was drawn out by counsel for defendant on trial for homicide, it was proper to permit the state to bring out the whole conversation.—State v. Spivey, Mo., 90 S. W. Rep. 81.

61. CRIMINAL LAW—Former Jeopardy.—A trial in N county, after a judgment of acquittal in county, for an offense committed near the county line, held contrary to the constitutional provision relating to former jeopardy.—*Ex parte* Davis, Tex., 89 S. W. Rep. 978.

62. CRIMINAL LAW—Setting Aside Plea of Guilty.—A defendant, not represented by counsel, pleading guilty to robbery by inducement of the officers having him in charge, held entitled to have the conviction set aside.—State v. Allen, Wash., 82 Pac. Rep. 1086.

63. CRIMINAL TRIAL—Confession in Homicide Case.—Where accused, while under arrest, and after being duly warned, voluntarily confessed the homicide, the confession was admissible against him.—Turner v. State, Tex., 89 S. W. Rep. 975.

64. CRIMINAL TRIAL — Continuance.—A continuance will not be granted to obtain impeaching testimony.—Rector v. State, Tex , 90 S. W. Rep. 41.

65. CRIMINAL TRIAL—Continuance.—A defendant, unable to procure the witness by which to prove newly discovered evidence at the hearing of his motion for new trial, held required to request a continuance.—Tyler v. State, Tex., 90 S. W. Rep. 33.

66. CRIMINAL TRIAL—Exclusion of Witnesses.—The act of the court in permitting a witness to testify after violating an order excluding witnesses from the courtroom, held not abuse of the court's discretion.—State v. Welch, Mo., 89 S. W. Rep. 945.

67. CRIMINAL TRIAL—Failure to Object to Improper Remarks.—The failure to object to the improper remarks of the prosecuting attorney is a waiver of the error arising therefrom.—State v. DeWitt, Mo., 90 S. W. Rep. 77.

68. CRIMINAL TRIAL—Falsity of Testimony.—In a prosecution for false swearing while being tried on a criminal charge before a county judge, the fact that the prosecution before such judge was pending when he administered the oath to defendant could be shown only by record evidence.—Goslin v. Commonwealth, Ky , 90 S. W. Rep. 228.

69. CRIMINAL TRIAL—Refusal of Continuance.—The error in refusing a continuance in a criminal case is waived by not assigning it as a ground for a new trial.—State v. Eaton, Mo., 89 S. W. Rep. 949.

70. CRIMINAL TRIAL—Rulings on Evidence.—Under the statute providing that the court shall not express its views on the testimony, the court should admit or exclude offered evidence without comment.—Rutherford v. State, Tex., 90 S. W. Rep. 172.

71. CRIMINAL TRIAL—Separate Trials of Defendants.—After a jury has been called into the box for the trial of a criminal case, it is too late to demand separate trials, as a matter of right, of defendants, jointly indicted.—State v. Bush, Wash., 82 Pac. Rep. 1024.

72. DAMAGES—Delay in Treating Injury.—One who suffers an injury is bound to exercise reasonable care in seeking medical or surgical aid, and if neglect so to do aggravates the injury, the injured party cannot recover for such aggravation.—Glasgow v. Metropolitan St. Ry. Co., Mo., 89 S. W. Rep. 915

73. DAMAGES—Insult to Passengers by Carrier's Servant.—The measure of damages for insults offered a passenger by a servant of the carrier is such sum as will compensate the passenger for injured feelings, mental suffering, and the like.—Gulf, C. & S. F. Ry. Co. v. Luther, Tex., 90 S. W. Rep. 44.

74. DISORDERLY HOUSE—Admissions.—Admission of the testimony of the sheriff on a prosecution for keeping a disorderly house, as to finding defendant there with a female inmate, and as to conversations they had, held not error.—State v. Cambron, S. Dak., 105 N. W. Rep. 241.

75. DIVORCE—Opportunity to Visit Child.—Father, on divorce, held entitled to provision for opportunity to visit child, in order awarding its custody to mother.—Barlow v. Barlow, Ky., 90 S. W. Rep. 216.

76. DOMICILE—Sleeping Place as Residence.—Where the statute undertakes to fix a residence at all, it makes the criterion where the party sleeps, and not where he takes his meals.—Paul v. State, Tex., 90 S. W. Rep. 171.

77. EJECTMENT—Equitable Title.—In ejectment by a trustee, his legal title will not prevail against the *cestui que trust* in lawful possession under the trust.—Bucher v. Overlees, Ind. T., 89 S. W. Rep. 1021.

78. ELECTION OF REMEDIES—Accounting.—A demand by a pledgor for an accouting of the proceeds of the use of pledged property, and for the sale price thereof, and the bringing of a suit to recover the same, held a waiver of the pledgee's tort in selling the property.—Demars v. Hudon, Mont., 82 Pac. Rep. 952.

79. ELECTRICITY - Safe Place to Work.—Where a contract between an electric company and another required the latter's servants to work in the electric company's power house, the company was bound to keep electrical wires near which such servants were required to work safe.—Ryan v. St. Louis Transit Co., Mo., 89 S W. Rep. 865.

80. EQUITY—Jurisdiction.—Where the jurisdiction of equity was properly invoked upon one branch of a cause, the court should have retained jurisdiction to settle all the rights of the parties in that action.—Smith Canal or Ditch Co. v. Colorado Ice & Storage Co., Colo., 82 Pac. Rep. 940

81. ESTOPPEL—Assessment of Taxes.—Where a taxpayer renders several lots in bulk, he is thereafter estopped from claiming that an assessment against them in bulk was illegal.—City of Houston v. Stewart, Tex., 90 S. W. Rep. 49.

82. ESTOPPEL—Filing Claim Against County.—County contractors held estopped to show that their verified claim for part payment on a heating system contract was not a payment on that contract, but was chargeable to a contract for a ventilating plant.—Russell-Vail Engineering Co. v. Kirby, Cal., 82 Pac. Rep. 1075.

83. ESTOPPEL—Knowledge of Acts of Others.—Mere knowledge on the part of one of the parties to a contract under which bonds were pledged, of a wrongful repledging by the pledgee, held not to have worked an estoppel against him.—Interurban Const. Co.v. Hayes, Mo., 89 S. W. Rep. 927.

84. EVIDENCE—Best and Secondary.—Evidence of the items "taken into consideration" in making up a written statement is not subject to the objection that the statement is the best evidence.—Sheldon Canal Co. v. Miller, Tex., 90 S. W. Rep. 206.

85. EVIDENCE—Burden of Proof.—In an action against carriers for injuries to cotton shipped, experts held entitled to testify that in their opinion the cotton had been damaged by fresh and not by salt water.—Houston & T. C. R. Co. v. Bath, Tex., 90 S. W. Rep. 55.

86. EVIDENCE—Establishment of Quarantine.—In an

action by a city to recover from county expenses incurred in establishing a quarantine, testimony of nonexperts as to the disease from which the person quarantined was suffering held inadmissible.—City of Bardstown v. Nelson County, Ky., 90 S. W. Rep. 246.

87. EVIDENCE—Law of Foreign State.—It will be presumed that the laws of Missouri are the same as those of Texas, and that a contract illegal in Texas is illegal in Missouri.—Southern Kansas Ry. Co. of Texas v. J. W. Burgess Co., Tex., 90 S. W. Rep. 189.

88. EVIDENCE—Parol Evidence Affecting Writing.—In action for price of threshing machine sold on written order, evidence of warranties not shown on the face of a contract held inadmissible.—Buffalo Pitts Co. v. Shriner, Wash., 82 Pac. Rep. 1016.

89. EVIDENCE—Parol Explanation of Written Instrument.—A written instrument held not a mere receipt, so as to warrant parol explanation.—Interurban Const. Co. v. Hayes, Mo., 89 S. W. Rep. 927.

90. EVIDENCE—Value of Corporate Stock.—Where the sole object of a corporation was to hold certain lands, evidence as to the value of its holdings is competent for the purpose of fixing the value of its stock.—Collins v. Denny Clay Co., Wash., 82 Pac. Rep. 1012.

91. EXCHANGE OF PROPERTY—Action for Breach of Contract.—In an action for value of certain real estate which plaintiff claimed defendant had agreed to transfer in exchange for other property, testimony that plaintiff was willing to quitclaim any title defendant may have transferred to him was immaterial.—Renshaw v. Dignan, Iowa, 105 N. W. Rep. 209.

92. EXECUTION—Notice of Sale.—Where a notice of sale on execution only described the interest of a husband in the land to be sold, the wife, who was a joint owner, was not entitled to have the sale enjoined.—Burris v. Craig, Colo., 82 Pac. Rep. 944.

93 EXECUTORS AND ADMINISTRATORS—Expenditures by Administrators.—Money expended by administrator for insuring property of the estate to preserve it during the course of administration is a charge which is entitled to payment prior to payment of debts.—Enscoe v. Fletcher, Cal., 82 Pac. Rep. 1075.

94. EXECUTORS AND ADMINISTRATORS—Foreclosure of Mortgage.—Where a mortgagee waived recourse against other property belonging to the mortgagor's estate than that covered by the mortgage, no presentation of his claim against the estate was necessary.—Heeser v. Taylor, Cal., 82 Pac. Rep. 977.

95. EXECUTORS AND ADMINISTRATORS—Liability for Money Received.—Where an executor or administrator applies to the use of the estate money or the proceeds of property belonging to a third person, he is liable in both his individual and representative capacity.—Collins v. Denny Clay Co., Wash., 82 Pac. Rep. 1012.

96. EXECUTION—Sale and Inadequacy of Price.—Mere inadequacy of price does not justify setting aside a sheriff's sale of land under a proper judgment, unless the moral sense is shocked.—State v. Elliott, Mo., 90 S. W. Rep. 122.

97. EXECUTORS AND ADMINISTRATORS—Time for Asserting Claim.—Defense in opposition to allowance of interest on claim against a decedent's estate on the ground that a properly verified claim was not presented to the personal representative, must be made promptly.—Beddow v. Wilson, Ky., 90 S. W. Rep. 228.

98. FINES—Disposition of Proceeds.—The legislature has the power to provide that costs and fines imposed by the corporation court established by Gen. Laws 1899, p. 40, ch. 33, for violations of offenses, shall be paid into the city treasury.—Howth v. Greer, Tex., 90 S. W. Rep. 211.

99. FINES—Imprisonment.—Under Pen. Code, § 1205, a judgment in contempt proceeding imposing a fine held not void for directing defendant's imprisonment until the fine was "paid," instead of using the statutory word "satisfied."—*Ex parte* Krouse, Cal., 82 Pac. Rep. 1043.

100. FRAUD—Persons Liable.—A buyer, apparently buying property from the owner, held entitled to sue a third person for fraud in inducing him to buy.—Thompson v. Randall, Ky., 90 S. W. Rep. 251.

101. FRAUDS, STATUTE OF—Agreement not to be Performed Within One Year.—That the period covered by a verbal agreement for services extends only one year from commencement of performance does not take it out of the statute.—Chase v. Hinkley, Wis., 105 N. W. Rep. 230.

102. FRAUDS, STATUTE OF—Oral Contracts.—An oral contract held not void within the statute of frauds.—W. S. Wolverton & Son v. Bruce & Butt, Ind. T., 89 S. W. Rep. 1018.

103. FRAUDULENT CONVEYANCE—Procedure in Creditor's Suit.—A creditor may, before reducing his claim to judgment, seize the estate fraudulently conveyed by attachment, and after judgment enforce his lien by a creditor's suit.—Ainsworth v. Roubal, Neb., 105 N. W. Rep. 248.

104. GUARDIAN AND WARD—Liability for Funds of Ward.—A guardian, depositing in a bank regarded solvent funds of the ward until invested under order of court, held not liable for a loss of the money through failure of the bank.—Murph v. McCullough, Tex., 90 S. W. Rep. 69.

105. HIGHWAYS—Establishment.—In a suit to restrain a trespass, where defendant claimed that the *locus in quo* was a public highway, the findings considered, and held not sufficient to establish a highway by prescription.—Rice v. Pershall, Wash., 82 Pac. Rep. 1038

106. HOMESTEAD—Establishment.—The fact that land claimed as a homestead is separated from claimant's dwelling house by a street is not conclusive of the question of homestead or no homestead, but may be considered in connection with other evidence.—Gibbs v. Adams, Ark., 89 S. W. Rep. 1008.

107. HOMESTEAD—Temporary Absence.—One's right to his homestead is not lost by his temporary absence from it on account of ill health; he still holding possession by a tenant.—Deweese v. Deweese, Ky., 90 S. W. Rep. 256.

108. HOMICIDE—Assault with Intent to Kill.—A conviction for assault with intent to murder held not subject to be set aside on the ground that there was no specific intent to kill considering the weapon used.—Jackson v. State, Tex., 90 S. W. Rep. 34.

109. HOMICIDE—Dying Declaration.—In a prosecution for homicide, a witness held properly permitted to testify to a dying declaration by deceased, limited to his statement as to his acts at the very time of the shooting.—Burroughs v. United States, Ind. T., 90 S. W. Rep. 8.

110 HOMICIDE—Evidence as to Reputation of Deceased.—Where the defendant in a prosecution for homicide introduces evidence reflecting on the good reputation of the deceased, the prosecution may rebut the evidence by proving the good reputation of deceased.—State v. Woodward, Mo., 90 S. W. Rep. 90.

111. HOMICIDE—Killing One with Design to Kill Another.—That one accused of murder thought he was murdering another person when he shot deceased in no way changes his liability for committing the crime.—Thompkins v. Commonwealth, Ky., 90 S. W. Rep. 221.

112. HUSBAND AND WIFE—Abandonment of Wife.—Accused never having furnished a "house or home" for his wife and children, an instruction that, if she, being offered a comfortable house by him, without excuse refused to live with him, she forfeited her rights, etc., held misleading and erroneous.—Hopkins v. State, Wis., 105 N. W. Rep. 223.

113. HUSBAND AND WIFE—Community Property.—Where a widow is made independent executrix of her husband's estate, it is improper for a creditor to proceed against her as survivor of the community.—Hartz v. Hausser, Tex., 90 S. W. Rep. 63.

114. INDIANS—Citizenship.—The conferring of the right of citizenship on an Indian allottee does not authorize him to lease the land allotted to him in violation of Act Feb. 5, 1887, 24 Stat. 389, ch. 119, § 5.—Williams v. Steinmetz Okla., 89 S. W. Rep. 986.

115. INDICTMENT AND INFORMATION—Following Language of Statute.—It is not necessary for a criminal information to charge the offense in the exact language of the statute, providing the words employed are equivalent in meaning to those contained in the statute.—Hase v. State, Neb., 105 N. W. Rep. 253.

116. INJUNCTION—Street Improvements.—Where city street improvements, constructed without authority, had been paid for, they could not subsequently be affected by injunction.—Graden v. City of Parkville, Mo., 90 S. W. Rep. 115.

117. INJUNCTION—Voluntary Dismissal.—The voluntary dismissal of injunction proceedings by the party instituting them does not necessarily constitute an admission that the injunction should not have been granted.—Thompson v. Benson, Wash., 82 Pac. Rep. 1040.

118. INTEREST—Open Accounts.—In an action on an open account for goods sold and services rendered, plaintiff held entitled to recover interest only from the date on which the balance due was ascertained, under Civ. Code, § 1917.—Erickson v Stockton & T. C. R. Co., Cal., 82 Pac. Rep. 961.

119. INTOXICATING LIQUORS—Action on License Bond.—In an action on a liquor license bond alleging that the licensee conspired with certain persons to assault the plaintiff, evidence examined, and held to require the submission of the question of conspiracy to the jury.—Quist v. American Bonding & Trust Co., Neb., 105 N. W. Rep. 255.

120. INTOXICATING LIQUORS — Criminal Prosecution Under Local Option Law.—In prosecution for violation of local option liquor law, accused held entitled to instruction that if he was representing the purchaser and not representing a liquor house he was not guilty.—Golightly v. State, Tex., 90 S. W. Rep. 26.

121. INTOXICATING LIQUORS—Illegal Sale.—Defendant held to have violated the local option law, where, a C. O. D. shipment of whisky having arrived for him, he was furnished by another with money to part of the C. O. D. charges, and therefore delivered to the other part of the whisky.—Hutchinson v. State, Tex., 90 S. W. Rep. 178.

122. INTOXICATING LIQUORS—Place of Sale.—In case of a C. O. D. sale of liquor, held it was at the point of shipment, and not at the point of destination, where local option obtained.—Golightly v. State, Tex., 90 S. W. Rep. 26.

123. JUDGES—Order in Vacation to Receiver.—A judgment directing a receiver to pay over certain moneys in his hands may not be entered in vacation.—Dupoyster v. Clark, Ky., 90 S. W. Rep. 1.

124. JUDGMENT—Action to Quiet Title.—In an action to quiet title, a judgment that plaintiff owns the land and that defendant has no interest adjudicates all questions affecting title.—Keeney v. City of Fargo, N. Dak., 105 N. W. Rep. 93.

125. JUDGMENT—Assignment.—Assignment of judgment rendered in an action on a note will not pass to the assignee a right of action on the stay bond given in the injunction proceedings to stay execution of judgment.—Crist v. McDaniel, Okla., 82 Pac. Rep. 991.

126. JUDGMENT—Collateral Attack.—Where a judgment sustaining an attachment against a nonresident directed a sale, it was not subject to collateral attack for failure to serve the attachment writ on the defendant.—Burris v. Craig, Colo., 82 Pac. Rep. 944.

127. JUDGMENT—Final Determination.—Where, in an action at law, the answer interposes an equitable counterclaim, and the decree rendered thereon makes the trial of any question of law unnecessary, such decree is the final determination of the action.—Cotton v. Butterfield, N. Dak., 105 N. W. Rep. 286.

128. JUDGMENT—Nonsuit.—After voluntary discontinuance before a justice, plaintiff held entitled as of right to commence a new suit, though the justice neglected to formally enter judgment of nonsuit.—Burkart v. Blaumann, Mich., 105 N. W. Rep. 81.

129. JUDGMENT—Persons Bound.—A decree declaring certain corporate stock to have been transferred as a mortgage, and purporting to bind the assigns thereof generally, is void as to assigns not before the court.—Collins v. Denny Clay Co., Wash., 82 Pac. Rep. 1012.

130. JUDGMENT—Setting Aside on Ground of Fraud.—A complaint in an action to set aside a judgment annulling a certificate for the purchase of state school lands held not to show that the judgment was obtained by fraud.—Cargile v. Silsbee, Cal., 82 Pac. Rep. 1044.

131. LANDLORD AND TENANT—Who are Tenants.—One who rents desk room from the tenant of an office held not a tenant, but to have a mere right of occupancy during the continuance of the tenant's lease.—Swart v. Western Union Telegraph Co., Mich., 105 N. W. Rep. 74

132. LARCENY—Possession of Stolen Property.—A request to charge that the presumption arising from possession alone of stolen property is removed by evidence of defendant's good character held properly refused.—People v. Peltin, Cal., 82 Pac. Rep. 980.

133. LARCENY—Possession of Stolen Property.—The failure of one accused of larceny to explain his possession of the stolen property may be taken as evidence against him, and a reasonable explanation may be used as the basis for an acquitttal.—Selph v. State, Tex., 90 S. W. Rep. 174.

134. LIBEL AND SLANDER—Corporations.—A letter charging defendant coal company with refusing to sell coal, even at extortionate prices, during a coal famine held libelous *per se*.—Gross Coal Co. v. Rose, Wis., 105 N. W. Rep. 225.

135. LIBEL AND SLANDER—Editorial Publications.—A certain publication concerning plaintiff held to import a libelous imputation that plaintiff on receiving certain money belonging to S converted or misappropraiated the same.—Scofield v. Milwaukee Free Press, Wis., 105 N. W. Rep. 227.

136. LIFE INSURANCE—Indorsement of Commission on Premium Note.—A life policy taken out by an agent of the insurer held not put in force half the year by indorsement on the first annual premium note of the agent's commission of 65 per cent.—Franklin Life Ins. Co. v. McAfee, Ky., 90 S. W. Rep. 216.

137. LIMITATION OF ACTIONS—Action of City Attorney for Commissions.—A suit by a city attorney to recover commissions earned under an ordinance fixing his salary and fees was not founded on a written contract, so as to be governed by the four-year statute of limitations.—City of Houston v. Stewart, Tex., 90 S. W. Rep. 49.

138. LIMITATION OF ACTIONS—Extinguishment of Lien.—Where a debtor's interest in certain bonds was pledged to secure a demand note of the same date, the creditor acquired a new lien, which was unenforceable after an action on the note was barred, under Civ. Code, § 2911.—Knoll v. Melone, Cal., 82 Pac. Rep. 982.

139. LIMITATION OF ACTIONS—Running Against Heir.—Where limitations against an action to recover land has commenced to run against an ancestor, it continues to run without interruption against the heir.—Shaffer v. Detle, Mo., 90 S. W. Rep. 131.

140. MALICIOUS PROSECUTION — Probable Cause.—Where defendant maliciously procured plaintiff's arrest for petit larceny without probable cause, it was no defense to a suit for malicious prosecution that the complaint did not charge such offense as defined by the Code.—Cochran v. Bones, Cal., 82 Pac. Rep. 970.

141. MANDAMUS—Answer.—Where a sufficient alternative writ of mandamus has been issued, and no jurisdictional question involved, under St. 1893, § 4603, motion to quash will be treated as an answer admitting the facts recited.—Beadles v. Fry, Okla., 82 Pac. Rep. 1041.

142. MASTER AND SERVANT—Assumed Risk.—An employee cutting down a tree held to assume the risk of being struck by the tree, or by limbs from other trees, broken off by its fall.—Anderson v. Columbia Imp. Co., Wash., 82 Pac. Rep. 1037.

143. MASTER AND SERVANT—Assumed Risk.—Where master is habitually negligent in a certain respect, the

servant, by remaining in the service, assumed the risk of injury therefrom.—Arenschield v. Chicago, R. I. & P. Ry., Iowa, 105 N. W. Rep. 200.

144. MASTER AND SERVANT—Contributory Negligence.—In an action by a servant, where plaintiff is charged with contributory negligence, evidence of an unfounded belief on his part as to a condition which caused the injuries held immaterial.—Hubler v. Johnson-McLain Co., Neb., 105 N. W. Rep. 247.

145. MASTER AND SERVANT—Fellow Servants.—The test of a master's liability for injuries to a servant caused by the negligent act of another servant is not the rank or grade of the latter servant, but the character of the act.—Page v. Battle Creek Pure Food Co., Mich., 105 N. W. Rep. 72.

146. MASTER AND SERNANT—Fellow Servants.—In an action against an elevator company for injuries to plaintiff while employed as a shoveler, held, that plaintiff and the truckman associated with him were fellow servants.—S. F. Dana & Co. v. Blackburn, Ky., 90 S. W. Rep. 287.

147. MASTER AND SERVANT—Negligence.—In an action by a fireman, against a railroad, for injuries received, evidence held to show that defendant was negligent, and that plaintiff was not guilty of contributory negligence.—St. Louis & S. F. R. Co. v. Bussong, Tex., 90 S. W. Rep. 73.

148. MASTER AND SERVANT—Safe Place to Work.—It is actionable negligence for the operators of a mine to suffer it to be unfit for use for lack of ventilation.—Andricus' Adm'r v. Pineville Coal Co., Ky., 90 S. W. Rep. 283.

149. MECHANICS' LIENS—Effect of Including Nonlienable Liens.—A mechanic's lien is not defeated by including nonlienable items by mistake, if they can be segregated from lienable ones.—Kittrell v. Hopkins, Mo., 90 S. W. Rep. 109.

150. MUNICIPAL CORPORATIONS—Paving Certificates.—Under a resolution of a city council, giving the city attorney a commission on sums collected by him by suit to enforce collection of taxes, the city held liable for arbitrarily releasing a portion of the judgment, or purchasing any of the property in satisfaction thereof.—City of Houston v. Stewart, Tex., 90 S. W. Rep. 49.

151. MUNICIPAL CORPORATIONS—Payment of Taxes.—A city charter held not to authorize action of the council in making paving certificates receivable for taxes levied to discharge the city's bonded indebtedness.—City of Houston v. Stewart, Tex., 90 S. W. Rep. 49.

152. MUNICIPAL CORPORATIONS—Street Improvements.—A city held not entitled to take stone from one portion of a street to repair other portions, to the damage of an abutting property owner, without first compensating her for the damages she would sustain.—Graden v. City Parkville, Mo., 90 S. W. Rep. 115.

153. NEWSPAPER—Publication as to Street Improvements.—A paper in which a resolution for the improvement of a street was published held the *de facto* official paper for the publication of such resolution.—City of North Yakima v. Scudder, Wash., 82 Pac. Rep. 1022.

154. PARENT AND CHILD—Loss of Injured Child's Services.—In an action for injuries to plaintiff's minor son, it was proper to exclude evidence that she had another son who contributed to her support.—Gulf, C. & S. F. Ry. Co. v. Johnson, Tex., 90 S. W. Rep. 164.

155. PARTNERSHIP—Firm Property.—Interests of partners held such that consent of one partner was not required to disposition of proceeds of sale of his share by the other.—First Nat. Bank v. Brubaker, Iowa, 105 N. W. Rep. 116.

156. PAYMENT—Protection of Securities.—A payment made for the redemption of bonds from a pledgee held, under the facts, not to have been a voluntary payment.—Interurban Const Co. v. Hayes, Mo., 89 S. W. Rep. 927.

157. PERJURY—Falsity of Testimony.—In a prosecution for false swearing, the jury must not only find that the testimony was given, but must also find beyond reasonable doubt that it was corruptly false.—Goslin v. Commonwealth, Ky., 90 S. W. Rep. 223.

158. PERJURY—Indictment.—An indictment for false swearing, in a prosecution for gaming, need not state when the alleged game was played; nothing appearing in the oath of the witness on that point.—Goslin v. Commonwealth, Ky., 90 S. W. Rep. 223.

159. PHYSICIANS AND SURGEONS — Compensation. — Though a physician does not guarantee a cure, it seems that he should not be permitted to recover for worthless professional service, if he has been negligent, unskillful, or unfaithful.—Logan v. Field, Mo., 90 S. W. Rep. 127.

160. PHYSICIANS AND SURGEONS—Liability of Railroad for Services to Injured Party.—On the question of the liability of a railroad to pay for physician's services rendered to an injured party, held immaterial, whether the railroad's claim agent agreed with the physician or with the injured person to employ the physician.—Reynolds v. Chicago, B. & Q. R. Co., Mo., 90 S. W. Rep. 100.

161. PLEADING—Amendment After Evidence Closed.—The court may permit an amendment of the complaint to conform to the proof after the evidence has been closed and the cause has been submitted, but before decision.—Ennis Brown Co. v. Hurst, Cal., 82 Pac. Rep. 1056.

162. PLEDGES—Lien.—Where a debtor's interest in certain bonds was pledged to secure a demand note of the same date, the creditor acquired a mere lien, which was unenforceable after an action on the note was barred, under Civ. Code, § 2911.—Knoll v. Melone, Cal., 82 Pac. Rep. 982.

163. PLEADING—Petition.—For a person to plead a single cause of action in several counts to meet any possible state of the proof held not error. — Landers v. Quincy, O. & K. C. R. Co., Mo., 90 S. W. Rep. 117.

164. PLEADING—Petition to Enforce Attorney's Lien.—Where a petition to enforce an attorney's lien failed to allege the means used to secure the fund or the sources, it could be attacked only by motion to make more definite and certain.—Butler v. Conwell, Wyo., 82 Pac. Rep. 950.

165. PLEADING—Want of Jurisdiction.—Where want of jurisdiction does not appear upon the face of the record, it may be pleaded with other defenses in the answer.—Templin v. Kinsey, Neb., 105 N. W. Rep. 89.

166. PRINCIPAL AND AGENT—Construction of Contract.—A contract between a principal and a canvassing agent held not to authorize the principal to employ other canvassers in the territory without notice to the agent —C. M. Hilliker & Son v. Allen, Iowa, 105 N. W. Rep. 120.

167. PRINCIPAL AND AGENT—Ostensible Authority of Agent.—Restrictions on the ostensible authority of the agent do not affect the rights of third persons without knowledge thereof.—Beynolds v. Chicago, B. & Q. R. Co., Mo., 90 S. W. Rep. 100.

168. PROCESS—Designation of Parties.—In a summons in an action to foreclose a tax certificate, it was proper to address defendant using his full Christian name, although in assessing the property his initial was used.—Stoll v. Griffith, Wash., 82 Pac. Rep. 1025.

169. RAILROADS—Contributory Negligence.— Though running a railroad train through a city at unlawful speed is negligence, it does not absolve pedestrians from the exercise of ordinary care to avoid injury.—Schmidt v. Missouri Pac. Ry. Co., Mo., 90 S. W. Rep. 186.

170. RAILROADS — Contributory Negligence. — A railroad company held liable for injuries to one walking on a trestle when a train approached, who jumped therefrom to avoid injury, whether he acted prudently or imprudently in his attempt to avoid the injury. — Texas Midland R. R. v. Byrd, Tex., 90 S. W. Rep. 185.

171. RAILROADS—Injury to Persons on Track. — In an action against a railroad for injuries to one crossing the track by a path, a definition of the path as a public crossing in an instruction held not prejudicial to defendant.—Gulf, C. & S. F. Ry. Co. v. Johnson, Tex., 90 S. W. Rep. 164.

172. RAILROADS — Injuries to Stock on Track. — In an

action against a railroad for injuring stock, the questions as to whether defendant's engineer or fireman saw or could have seen the stock in time to avoid the injuries, and whether such employees failed to use ordinary care so to do, held for the jury.—Louisville & N. R. Co. v. Rhoads, Ky., 90 S. W. Rep. 219.

173. RAPE—What Constitutes Assault with Intent.—To constitute an assault with intent to rape a girl under 15 years of age, there must be a taking hold of her for the purpose of sexual intercourse.—Hudson v. State, Tex., 90 S. W. Rep. 177.

174. RECEIVERS—Necessity of Appointment.—A party to an action should not, against his will, be subject to the expense of a receiver, unless his appointment is obviously necessary to protect the opposite party. —DeLeonis v. Walsh, Cal., 82 Pac. Rep. 1047.

175. RECEIVERS—Presentation of Claims.—Where an attorney for creditors recovered a fund for an insolvent's estate, it was immaterial to the validity of his lien for fees whether he presented his claim to the court, or whether it was presented by his client.—Butler v. Conwell, Wyo., 82 Pac. Rep 950.

176. REFORMATION OF INSTRUMENTS — Mistake. — In a suit to reform the description in a deed for alleged mistake, the burden is upon the complainant to establish his contention by a clear preponderance of the evidence. —Heffron v. Fogel, Wash., 82 Pac. Rep. 1003.

177. SALES—Breach of Warranty. — In an action for damages for breach of warranty as to the character of a rooming house, damages for humiliation and mental agony resulting to plaintiff held not recoverable.—Walsh v. Meyer, Wash., 82 Pac. Rep. 938

178. SALES — Inconsistent Provisions. — Purchaser of stock in corporation held not estopped to rescind contract of purchase by attending stockholders' meeting.—Landis v. Wintermute, Wash , 82 Pac. Rep. 1000.

179. SALES—Offer and Acceptance.—A stipulation as to delivery in an acceptance of an offer for the sale of potatoes held not to operate as a new condition, requiring its acceptance in order to constitute a contract.—Ennis Brown Co. v. Hurst, Cal., 82 Pac. Rep. 1056.

180. SALES—Rescission by Agreement.—The rescission of a contract by mutual agreement of the parties held a sufficient consideration to support an implied waiver by one party of a claim for damages for a prior breach of the contract by the other.—Alabama Oil & Pipe Line Co. v. Sun Co., Tex., 90 S. W. Rep. 202.

181. SALES—Trade Talk.—Representations of a selling agent with reference to the condition and power of an engine held mere expressions of opinion, or "trade talk," which could not be made the basis of a charge of fraud.—Gaar, Scott & Co. v. Halverson, Iowa, 105 N. W. Rep. 108.

182. SPECIFIC PERFORMANCE — Taxes and Improvements.—Grantees of land under an agreement to reconvey part of it after the rents and profits had paid incumbrances and reimbursed the grantees held chargeable on accounting with taxes and improvements.—Clutter v. Strange, Wash., 82 Pac. Rep. 1028.

183. STREET RAILROADS—Care Required as to Persons on Private Way.—Where pedestrians have for a considerable time been in the habit of walking along a railroad's private right of way, a motorman, before reaching a point where he has reasonable grounds to anticipate the presence of persons, is required to keep a lookout.—Levelsmeier v. St. Louis & S. Ry. Co., Mo., 90 S. W. Rep. 104.

184. STATUTES—Construction as to Proviso.—The rule that a proviso to a statute relates to the paragraph which immediately precedes does not apply where it clearly appears that it was intended to apply to the whole statute. —State v. Webber, Minn., 105 N. W. Rep. 68.

185. STREET RAILROADS—Injury Due to Sudden Jerking of Car.—A passenger injured by the sudden jerking of the street car on which he was riding held not guilty of contributory negligence.—Griffin v. Pacific Electric Ry. Co., Cal., 82 Pac. Rep. 1094.

186. STATUTES — Presumption that Bill was Legally Passed.—The journal of either house of the legislature held not admissible to overcome the presumption that a bill was legally passed.—Sacramento Pav. Co. v. Anderson, Cal., 82 Pac Rep. 1069.

187. STATUTES—Repeal by Implication. — Repeals by implication are not covered by the constitutional provision, requiring the subject of every act shall be expressed in its title.—Coleman v. Cravens, Wash., 82 Pac. Rep. 1005.

188. SUNDAY—Intoxicating Liquors.—An instruction that defendant must have kept his place open for the sale and exchange of goods, wares, and merchandise, and to acquit if he kept it open for any other cause or reason held not necessary on a prosecution for violation of the Sunday law.—Smith v. State, Tex., 90 S. W. Rep. 37.

189. TAXATION—Inadequacy of Price.—The rule that inadequacy of price will justify setting aside a sheriff's sale of land, if the inadequacy is such as to shock the moral sense, is applicable to a sale under judgment for taxes.—State v. Elliott, Mo., 90 S. W. Rep. 122.

190. TAXATION—Redemption from Sale.—Payment of taxes need not be shown, in order to entitle one to redeem from a tax sale, where no proper notice was given of the expiration of the period of redemption.—Iowa Loan & Trust Co. v. Pond, Iowa, 105 N. W. Rep. 68.

191. TAXATION—Void Tax Sale.—Purchaser of void tax title held entitled to refundment of taxes paid by him, but not entitled to a refundment of costs or penalties. —Hamilton v. Brownsville Gaslight Co., Tenn., 90 S. W. Rep. 159.

192. TELEGRAPHS AND TELEPHONES—Construction of Statute as to Penalties.—Under Rev. St. 1899, §§ 1255, 1257-1259, telephone company held not liable to penalty for failure to place a party in direct personal communication with another over its telephone system.—Pollard v. Missouri & K. Telephone Co., Mo., 90 S. W. Rep. 121.

193. TELEGRAPHS AND TELEPHONES—Delay in Delivering Death Message. — A telegraph company, having caused the addressee of a death message mental suffering by delay in delivery, held liable, though she would have suffered other anguish had the telegram been promptly delivered.—Western Union Telegraph Co. v. Shaw, Tex., 90 S. W. Rep. 58

194. TENANCY IN COMMON—Acquisition of Tax Title.—Where a title purchased from tenants in common was defective as to one of such tenants, the purchaser had a right to strengthen his title by purchasing a tax title.—Stoll v. Griffith, Wash., 82 Pac. Rep. 1025.

195. VENDOR AND PURCHASER—Assumption of Vendor's Debts.—The failure of a grantee to pay a note assumed by him held to give the holder of the note the right to foreclose the lien on the granted land given to secure it. —Diffie v. Thompson, Tex., 90 S. W. Rep. 198.

196. VENDOR AND PURCHASER—Conveyance of Perfect Title.—A purchaser of real estate is not required to investigate as to facts affecting the title not disclosed by the abstract furnished under the contract of sale.—Whelan v. Rosseter, Cal., 82 Pac. Rep. 1082.

197. WILLS—Construction.—Will devising all testator's property, except $500,000, to his wife in trust, and the residue of his estate to her, held to give her the $500,000 in fee.—Mitchell v. Mitchell, Wis., 105 N. W. Rep. 216.

198. WILLS—Undue Influence.—Neither advice nor solicitation affects a will unless it be further shown that the freedom of will was in some way impaired.—*In re* Townsend's Estate, Iowa, 105 N. W. Rep. 110.

199. WITNESSES—Credibility.—Where defendant testifies in his own behalf, it is competent to show his prior conviction of a criminal offense in order to affect his credibility, but it must be shown by competent evidence. —State v. Woodward, Mo., 90 S. W. Rep. 90.

200. WITNESSES — Impeachment. — An accused whose testimony is impeached by contradictory statements is entitled to prove that he had made the same statements out of court that he made at the trial.—Hudson v. State, Tex., 90 S. W. Rep. 177.